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No. 04-04 166

IN THE

Supreme Court of the United States

FRED LOVELL, *et al.*,
Petitioners,

v.

JOSEPH S. COCHRAN, *et al.*,
Respondents.

On Appeal from the United States Court of Appeals for the Third Circuit

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PETITION FOR CERTIORARI OF FRED LOVELL, *et al.*

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QUESTION PRESENTED

1. Whether the Dairy Promotion and Stabilization Act of 1983 (Dairy Act), 7 U.S.C. §§ 4501-4514 (2004), and the Dairy Promotion and Stabilization Order (Dairy Order), 7 C.F.R. pt. 1150, violate the First Amendment by requiring dairy producers, in connection with a comprehensive regulatory scheme, to pay assessments to fund generic advertising promoting milk and other dairy products.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Fred Lovell, Lee Greenwalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vanblarcom.

This case arises out of an appeal to the U.S. Court of Appeals for the Third Circuit by Joseph S. Cochran and Brenda S. Cochran. *Cochran v. Veneman*, No. 03-2522. The Cochrans appealed to the Third Circuit from a decision of the U.S. District Court for the Middle District of Pennsylvania that had rejected their First Amendment claims on cross-motions for summary judgment. *Cochran v. Veneman*, No. 4:CV-02-0529. Petitioners, having intervened in the District Court, were appellees in *Cochran v. Veneman*, No. 03-2522, in the Third Circuit along with Ann Veneman (in her official capacity as Secretary of Agriculture), the United States Department of Agriculture, and the Dairy Promotion and Research Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Fred Lovell, Lee Greewalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vanblarcom, by counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-29a) is reported at 359 F.3d 263. The opinion of the district court (App. 30a-46a) is reported at 252 F.Supp.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2004. Petitions for rehearing were denied on May 3, 2004(App. 47a-48a). This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Dairy Promotion and Stabilization Act of 1983, 7 U.S.C. §§ 4501-4514, is reproduced at App. 49a-67a.

3. The Dairy Promotion and Stabilization Order, 7 C.F.R. pt. 1150, is reproduced at App. 68a-90a.

STATEMENT

1. This case presents a First Amendment challenge to the Dairy Promotion and Stabilization Act of 1983 (Dairy Act), 7 U.S.C. §§ 4501-4514, which requires domestic dairy producers to pay assessments to fund generic advertising and

promotion, research, and nutrition education programs conducted under the extensive supervision and oversight of the Secretary of Agriculture.[1] The Dairy Act is a part of the comprehensive regulation of the Nation's dairy industry that sets minimum prices for most raw milk produced in the Nation and regulates most of the distribution of raw milk in the Nation.

This Court recently granted certiorari to review the First Amendment analysis concerning a similar program funding generic promotions of beef. *Veneman v. Livestock Marketing Association*, 335 F.3d 711 (3d Cir. 2003), cert. granted, (May 24, 2004). *Livestock Marketing* presents two of the three issues presented here, i.e., (1) government speech and (2) the application of an intermediate scrutiny test for the compelled funding of commercial speech. Petitioners respectfully request that this Court grant this petition and hold this case pending this Court's resolution of *Livestock Marketing*. If the Eighth Circuit's decision in *Livestock Marketing* is affirmed by this Court, Petitioners respectfully request that this Court then schedule this case for briefing and oral argument.

A. In 2002, Respondents Joseph and Brenda Cochran brought suit against the Secretary of Agriculture to obtain a declaration that the Dairy Act violated the Cochrans' First Amendment rights of free speech and free association. Petitioners, dairy producers who support the Dairy Act promotion program, intervened to defend the law. The District Court, on cross-motions for summary judgment, granted the summary judgment motions of the government and Petitioners, holding that the Dairy Act was part and parcel of the comprehensive regulatory scheme applicable to the marketing of dairy products. App. 41a-42a.

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[1] A 2002 Amendment required, for the first time, that the assessment be collected on imported dairy products. 7 U.S.C. §§ 4501-4514 (2004), amended May 13, 2002, P.L. 107-171, Title I, Subtitle E, § 1505(h)(1), 116 Stat. 210.

B. On appeal, the Third Circuit reversed, holding that the Dairy Act violated the First Amendment rights of the Respondents. In doing so, the Third Circuit rejected the argument that the generic promotion program funded by Dairy Act assessments produced "government speech" immune from First Amendment scrutiny.

C. The Third Circuit also rejected the argument that Respondents' First Amendment claim was controlled by this Court's decision in *Glickman v. Wileman*, 521 U.S. 457 (1997), because the Dairy Act is ancillary to the comprehensive regulation of the dairy industry that has displaced many aspects of individual business activity of dairy producers.

In *Glickman v. Wileman,* 521 U.S. at 469, this Court rejected a First Amendment challenge to two California tree fruit marketing orders by explaining that "California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced may aspects of independent business activity." This Court there noted that nectarine and peach producers who are "compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* This Court ruled that the advertising of California tree fruit was germane to the broader regulatory scheme for those commodities and that, in any event, the marketing orders did not fund ideological activities. *Id.* at 473. *See Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

In contrast, the Third Circuit ruled that the Dairy Act violated the First Amendment because, it concluded, the Dairy Act is not ancillary to a broader regulatory scheme. It said, "[The Dairy Act] is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for

milk that encompasses all dairy producers." App. 18a-19a (emphasis added).

Even though more than 96% of the raw milk sold in the United States is priced under federal or state milk marketing orders, and even though 75% of all milk marketed in the Nation is processed by handlers regulated by federal milk marketing orders, and even though the USDA purchases dairy products to fulfill its statutory obligation under the Agricultural Act of 1949, 7 U.S.C. § 1446, to maintain a floor under milk prices, the Third Circuit nevertheless ruled that the Dairy Act was not ancillary to a broader statutory scheme in which milk producers' "freedom to act independently is already constrained by the regulatory scheme." *See Glickman v. Wileman*, 521 U.S. at 469.

Rather, the Third Circuit ruled that this case was governed by *United States v. United Foods*, 533 U.S. 405 (2001). In *United Foods* this Court ruled that the use of assessments to fund generic advertising under the Mushroom Act, 7 U.S.C. §§ 6101 6112 (2004), violated the First Amendment because the program was "not part of some broader regulatory scheme." 533 U.S. at 415. In ruling that *United Foods* governed the result in this case, the Third Circuit stated that "[t]he Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme". App. 9a; *Cochran*, 359 F.3d at 270. It noted, "In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws." *Id.* Finding the *Glickman* rule inapplicable, it concluded, "The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative." *Id.* at 275.

In contrast, following on the heels of this Court's 1997 *Glickman* decision but prior to its 2001 ruling in *United Foods*, two other circuits ruled that the Dairy Act did not violate the First Amendment because its advertising program was ancil-

lary to a broader regulatory scheme. *Nature's Dairy v. Glickman*, No. 98-1-73, 1999 WL 137631 (6th Cir. Mar. 2, 1999), 173 F.3d 429 (table), *cert. denied*, 528 U.S. 1074 (2000); *Gallo Cattle Co. v. California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999) ("Gallo I"); *Gallo Cattle Co. v. USDA*, No. 98-17318, 1999 WL 547427 (9th Cir. July 27, 1999), 189 F.3d 473 (Table) ("Gallo II").

D. The Third Circuit also rejected Petitioners' argument that the Dairy Act satisfied the intermediate scrutiny test for commercial speech regulations set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The Third Circuit noted that in addition to the government's interest in increasing demand for dairy products generally, the government had also argued that it "has a substantial interest in decreasing its obligation under the dairy price support program . . . ." App. 25a; *Cochran*, 359 F.3d at 279. The Third Circuit rejected this argument, however, noting that "the Dairy Act does not operate in conjunction with the price support program" and that "reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process." *Id.*

Seeming to confuse unprocessed, raw milk with processed fluid milk, the Third Circuit suggested that "producers of liquid milk such as the Cochrans are not covered by the price support program." *Id.* All raw milk sold by producers is, of course, liquid milk. Producers sell what cows produce—raw milk. That the government purchases shelf stable milk powder, cheese, and butter rather than processed fluid milk under the price support program, however, is not to say that the milk price support purchases support only the prices of those processed commodities. In fact, the milk price support program supports all raw milk prices (including the raw milk

sold by the Cochrans), because it is that raw milk that is utilized in making each of the processed, shelf-stable products that the government purchases. No matter to what ultimate purpose the Cochran's raw milk is put, the demand for that raw milk is increased by the government's entry into the marketplace to purchase various products made from raw milk.

The Third Circuit concluded that the government's interest in promoting the dairy industry is "not sufficiently substantial" to justify the infringement of the Cochran's First Amendment free speech and association rights," noting that the "Dairy Act seem[s] to really be special interest legislation more than the government's." App. 25a-26a; *Cochran*, 357 F.3d at 279. Yet, the Third Circuit offers no benchmark or test for making this important determination. It would seem that all legislation that passes Congress is of special interest to one set of citizens or another. For example, an Energy Bill is legislation in which energy companies have a "special interest." A Communications Bill is legislation in which local, long distance, and wireless companies have a "special interest." A Transportation Safety Bill is legislation in which airlines, common carriers, railroads, and trucking companies have a "special interest." To label the Dairy Act as "special interest" legislation and thereby conclude that it fails to satisfy *Central Hudson* creates a dangerous and unprincipled standard that merits review by this court.

In contrast, the Third Circuit has previously found the federal government's interest in the promotion of beef consumption to be not merely a substantial government interest, but a compelling one. *United States v. Frame*, 885 F.2d 1119, 1133-1137 (3rd Cir. 1989), *cert. denied* 493 U.S. 1094 (1990) (the Third Circuit ruled that assisting the beef industry to maintain and increase demand for beef in the context of the Beef Promotion Act was a compelling government interest).

2. The extensive regulation of the marketing of milk and other dairy products in the United States brings this case within this Court's decision in *Glickman*. The Third Circuit's decision creates a conflict with the Sixth Circuit's decision in *Nature's Dairy* and with the Ninth Circuit's decisions in *Gallo I* and *Gallo II*.

3. In 1949, Congress enacted a federal price support program for milk. 7 U.S.C. § 1446. Congress authorized the Secretary of Agriculture to purchase butter, cheese, and milk powder in order to support domestic milk prices. S. Rep. No. 98 163 at 12-13, reprinted in 1983 U.S.C.C.A.N. 1658, 1669 70; App. 92a. The price support program puts a floor under the price of manufacturing milk and maintains a floor under all milk prices. *Id.* By 1983, the price support program had fulfilled its statutory goals, but had also caused milk production to outpace demand. By 1984, nearly 20 billion pounds of dairy surplus existed, which required the government to maintain warehouses containing huge stores of surplus dairy products. App. 103a.

4. In response, Congress passed the Dairy Act in 1983 to reduce the surplus of dairy products the government was required to buy and store under the milk price support program. Because "dairy products are a valuable part of the human diet," because "the production of dairy products plays a significant role in the Nation's economy," and because "the maintenance and expansion of existing markets for dairy products are vital to * * * the general economy of the Nation," Congress enacted the Dairy Act to "strengthen the dairy industry's position in the marketplace" through, among other things, a "coordinated program of promotion." 7 U.S.C. § 4501(a),(b); App. 49a-50a.

The Dairy Act requires dairy producers to pay an assessment of 15 cents per hundredweight of milk sold in the United States to fund research, nutrition education, and promotional activities. To achieve these substantial government

objectives, Congress created the National Dairy Board ("Dairy Board") to operate under the direct supervision and control of the Secretary of Agriculture. 7 U.S.C. § 4504(b)(1); App. 53a; 7 C.F.R. § 1150.131(a); App. 71a.

The Dairy Act directs the Secretary of Agriculture to promulgate a "dairy products promotion and research order." 7 U.S.C. § 4503(a); App. 51a-52a. The Secretary issued such a Dairy Order in March 1984. 7 C.F.R. pt. 1150; App. 68a. The Order provides for the establishment of the Dairy Board to administer the Dairy Program under the Secretary's extensive oversight and supervision. 7 U.S.C. § 4504(b)-(f), (h)-(i); App. 53a-56a, 58a. The Secretary appoints all 36 members of the Dairy Board from nominations she receives from eligible dairy producer organizations that meet the Secretary's requirements and have been certified by the Secretary as meeting those requirements. 7 U.S.C. § 4504(b); App. 53a.

The Act provides that the Board shall "administer the order in accordance with its terms and provision[s]," 7 U.S.C. § 4504(c)(2); App. 54a-55a. The Act provides that the Board shall have the power to "develop . . . plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals." 7 U.S.C. § 4504(c)(1); App. 54a-55a. All such plans and projects must be "approved by the Secretary before becoming effective." 7 U.S.C. § 4504(d); App. 55a; 7 C.F.R. § 1150.140(e); App. 77a. The Secretary must also approve the budget of the Dairy Board and any contract or agreement through which the Board seeks to develop or implement any of its plans or projects. 7 U.S.C. § 4504(e)-(f); App. 55a-56a; *see* 7 C.F.R. § 1150.140(g)-(i); App. 77a-78a. The Act also provides, "There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subtitle." 7 U.S.C. § 4513; App. 66a. This section also

provides that no appropriated funds shall pay the expenses of the Dairy Board itself. *Id.*

5. Under the Agricultural Marketing Agreement Act of 1937, federal milk marketing orders regulate the marketing of milk in much of the country. 7 U.S.C. § 608c(1),(2); App. 104a. Eleven federal milk marketing orders cover most of the contiguous 48 states. App. 104a. The marketing of milk is extensively regulated by federal milk marketing orders, expressly exempt from antitrust laws, and milk marketing orders displace competition in the markets to which they apply. App. 99a.

To prevent competition among farmers seeking to sell their raw milk for higher-valued fluid milk use, all farmers who sell their milk to federal order regulated processors are paid a "blended" price for all their milk. Federal milk marketing orders classify milk according to its ultimate use and "*establish[ ] minimum prices for fluid grade milk in most parts of the country.*" S. Rep. No. 98-163 at 13; App. 99a (emphasis added).

Handlers regulated under federal marketing orders process approximately 75% of all milk marketed in the United States. App. 104a, 108a. State milk marketing orders cover most areas not covered by federal orders. App. 110a-111a. More than 96% of all raw milk sold in the United States is priced under a federal or state milk marketing order. *Id.* Respondents live in an area that is covered by a Pennsylvania state milk marketing order. Respondents have sold their milk to a processor governed by a federal milk marketing order. *Id.*

6. In 1994, the Dairy Board and the United Dairy Industry Association ("UDIA"), a federation of qualified state and regional dairy promotion, research, or nutrition education programs, created Dairy Management, Inc. ("DMI"). App. 100a. DMI is a separate entity created by the merger of the staffs of the Dairy Board and UDIA to form a single staff that serves both organizations. App. 100a-101a.

7. Pursuant to the USDA's "Guidelines for AMS Oversight Of Commodity Research and Promotion Programs," all advertising of the Dairy Board or DMI must be approved in advance by the Agricultural Marketing Service ("AMS") of the USDA. App. 118a; App. 124a-125a. Advertising has been altered by DMI, on a consistent basis, to respond to the objections of the Dairy Programs Division of USDA. App. 125a. No advertising to which the Dairy Programs Division has objected has been used until those objections have been addressed. *Id.*

In 1998 DMI requested the Dairy Programs' approval of a television commercial entitled "Paws" that involved a "milk-deprived grandmother" being forced to give her cat non-dairy creamer instead of milk. App. 102a, 125a. Dairy Programs rejected the ad because it believed it was disparaging to soybeans. *Id.* After DMI and others responded to the concerns raised by Dairy Programs, Dairy Programs approved the commercial with the caveat that if there was opposition, it would be taken off the air. App. 102a-103a, 128a-137a.

The Dairy Board is required to maintain books and records as the Secretary may require, and is required to make them available to the Secretary for inspection and audit, as the Secretary may prescribe. 7 U.S.C. § 4504(h); App. 58a. The Board is required to provide the Secretary with all information the Secretary requests and is required to give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. § 1150.140 (l)-(m); App. 78a-79a.

The promotion and research activities of the Dairy Board are funded by assessments paid by producers. 7 C.F.R. § 1150.152 (a),(b); App. 79a. Each producer of milk marketed commercially in the 48 contiguous states is required to pay an assessment of fifteen cents per hundredweight to the Dairy Board. *Id.* A producer who contributes to a State or regional dairy promotion, research, or nutrition education

program certified by the Secretary as a "Qualified Program" is entitled to a credit of up to ten cents per hundredweight against the amount that would otherwise be owed to the Dairy Board. 7 C.F.R. § 1150.152(c); App. 80a; 1150.153(a); App. 81a.

The Act and Order prohibit the use of assessments collected by the Board for the purpose of "influencing governmental policy or action," except for making recommendations to the Secretary for an amendment to the Dairy Order. 7 U.S.C. § 4504(j); App. 58a; 7 C.F.R. § 1150.154; App. 84a.[2] All patents, copyrights, inventions, or publications developed through the use of Dairy Act funds become "the property of the U.S. Government as represented by the [Dairy] Board." 7 C.F.R. § 1150.184; App. 89a.

8. The Capper-Volstead Act permits dairymen to join together into cooperatives to process, prepare, and market their products without fear of prosecution under the antitrust laws. 7 U.S.C. § 291; App. 98a-99a. Dairy cooperatives established under Capper-Volstead may legally fix the prices at which their members' products may be sold. S. Rep. No. 98-163 at 13; App. 99a. In 1997, the Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83% of all the milk sold in the United States, to plants and dealers. App. 104a, App. 138a 139a.

9. U.S. law imposes tariffs and quotas, on the importation of milk, cheese, and other dairy products into the United States. 19 U.S.C. § 1202; App. 99a-100a. The purpose of these import controls is to "protect the price support system

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[2] Such restrictions are common when the government employs funds to implement governmental policies or programs. *See, e.g.*, Energy and Water Development Appropriations Act of 2002, Pub. L. No. 107-66, 115 Stat. 486, 504 (prohibiting use of funds made available under Act "to influence legislative action on any matter pending before Congress or a State legislature").

and keep the U.S. Government from supporting world milk prices." S. Rep. No. 98-163 at 13; App. 100a.

REASONS FOR GRANTING THE PETITION

The Third Circuit has held unconstitutional an Act of Congress that is part of a long-standing and comprehensive federal regulatory scheme that limits the marketing autonomy of individual milk producers in this country. The judgment of the Third Circuit is incorrect and merits review by this Court.

Respondents' claim does not raise a First Amendment issue for the courts to resolve because the Dairy Act is an economic policy that the Congress is free to adopt with only limited scrutiny from the courts. The Dairy Act was enacted to reduce a 20 billion pound surplus of dairy products purchased and stored by the federal government pursuant to the milk price support program. It was also enacted to protect the livelihood of dairy producers and others in the dairy industry, to provide nutrition education to consumers, and to strengthen the Nation's economy. As such, it is not a law "abridging the freedom of speech" but rather is a law that promotes speech—government speech. That government speech is funded by a modest assessment paid by persons who voluntarily participate in the dairy industry. Even if the speech is deemed commercial, rather then government, speech, the Dairy Act directly advances a substantial government interest in a well-tailored manner, and as such does not violate the First Amendment.

Whether analyzed under the First Amendment standard applied to economic regulation, government speech, or commercial speech, the Dairy Act does not abridge Respondents' freedom of speech or association. In holding that *Glickman* does not apply, the Third Circuit's judgment directly conflicts with decisions of the Sixth and Ninth Circuits. In also holding that the Dairy Act does not produce government speech, the Third Circuit's decision threatens the government's ability to decide how it funds its own speech. In holding that government

interest in the Dairy Act is not substantial under the commercial speech test, the Third Circuit has rendered a decision that cannot be reconciled with its prior holding in *United States v. Frame*, *supra*, where it held that the government interest in beef promotion was a compelling government interest.

This Court should review the Third Circuit's exercise of the "grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965).

I. THE THIRD CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS THAT HAVE CORRECTLY DECIDED THAT COMPREHENSIVE REGULATION OF MILK MARKETING RENDERS THE DAIRY ACT'S ASSESSMENT FOR GENERIC PROMOTION CONSTITUTIONAL

Because the generic advertising component of the Dairy Act is ancillary to the comprehensive regulation of the sale and production of milk in the United States, this case is controlled by *Glickman*. The promotion component of the Dairy Act is only one aspect of the comprehensive regulation of milk production and marketing that "establish and maintain orderly marketing conditions and fair prices" for milk. *See Glickman v. Wileman*, 521 U.S. at 461. Because the promotion component is "the logical concomitant of a valid scheme of economic regulation," *United Foods*, 533 U.S. at 412, the Dairy Act does not violate the First Amendment.

In 1999, the Sixth Circuit ruled that the Dairy Act does not violate the First Amendment. *Nature's Dairy v. Glickman*, *supra*. In *Nature's Dairy*, the Sixth Circuit ruled that "the Dairy Promotion Program, similar to the [tree fruit] program in [*Glickman v. Wileman*], is part and parcel of a legitimate regulatory scheme for promotion of commodities . . . . The advertising campaign funded by the Dairy Act is designed to stimulate consumer demand for a highly regulated product." *Id.* at 3. The Sixth Circuit noted that "while appellants

vigorously object to the mandatory provisions of the Dairy Act, in the absence of constitutional infirmity, this Court must defer to the judgment of Congress." *Id.* In *Nature's Dairy*, a group of Michigan dairy producers brought an action seeking a declaration that the Dairy Act violated their First Amendment rights. The district court rejected plaintiffs' claims and granted summary judgment in favor of the government. In addressing the question of "whether being compelled to fund this advertising raises a First Amendment issue" or "whether it is simply a question of economic policy for Congress and the Executive to resolve," the Sixth Circuit applied *Glickman*. *Id.*

In *Nature's Dairy*, the challengers urged the Sixth Circuit to distinguish *Glickman* from their case on the basis that "the challenged provisions create a stand-alone program." Specifically, the challengers argued that *Glickman* "involved a provision of a comprehensive marketing order of which the advertising portion was but one part." *Id.* The Sixth Circuit, rejecting this argument, noted that the district court "found the Dairy Promotion Program similar to the program in *Glickman*" and that the Dairy Promotion Program "is part and parcel of a legitimate regulatory scheme for promotion of commodities." *Id.* The Sixth Circuit noted that "federal regulation has permeated the dairy industry for more than fifty years" and that "for decades, the federal government has operated a dairy price support program which was so successful that by the 1980's milk production outpaced demand, requiring the government to buy increasingly larger quantities of dairy products." *Id.* (citing S. Rep. No. 98-163 at 14-15).

The Sixth Circuit affirmed the District Court's analysis and held:

> The Dairy Act does not impose any restraint upon a producer from communicating any message to any audience. No producer is required to engage in actual or symbolic speech. The advertising at issue promotes only

> the consumption of dairy products and does not identify individual financial sponsors. Finally, the advertising program does not compel any producer to endorse or fund any political or ideological view.

Id.

The Ninth Circuit agreed. In *Gallo I*, the Ninth Circuit rejected Gallo's First Amendment challenge to the California state analogue to the Dairy Act. In that case, relying on *Glickman*, the Ninth Circuit held, "The [California State] Milk Marketing Order is a species of economic regulation that does not abridge Gallo's First Amendment rights." 185 F.3d at 977. The Ninth Circuit determined that California milk producers were subject to extensive economic regulation, noting that "[plaintiff] Gallo admits that the California milk producers are regulated to the same extent as, if not more than, the tree fruit growers in [*Glickman v. Wileman*]." 185 F.3d at 974. In light of this, the Ninth Circuit rejected Gallo's First Amendment claims with respect to the California Milk Marketing Order.

The Ninth Circuit adopted the same rationale in rejecting Gallo's First Amendment challenge to the Dairy Act in *Gallo II*. In making its decision that the Dairy Act was constitutional under *Glickman*, the Ninth Circuit stated that "[t]he advertising program here is *indistinguishable in all relevant aspects* from the programs held constitutional by the Supreme Court in [*Glickman*] and by this court in *Gallo I*." *Gallo II* at 1. (Emphasis added.)

Following its analysis in *Gallo I*, in *Gallo II* the Ninth Circuit ruled that under the Dairy Act dairy farmers are compelled to fund generic advertising for fluid milk and dairy products "as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* (quoting *Gallo I*, 185 F.3d at 975 (quoting *Glickman v. Wileman*, 521 U.S. at 469)). The Ninth Circuit further concluded that the Dairy Promotion Program

of the Dairy Act "does not impose a restraint on Gallo's freedom to communicate," does not "compel Gallo to engage in any actual or symbolic speech," and does not require Gallo to be "publicly associated with the generic advertising." *Id.*

The Third Circuit, relying on *United Foods*, concluded that *Glickman* was inapplicable because the Dairy Promotion Program is a so-called "stand-alone program" in which there is no comprehensive industry regulation as a component of the Dairy Act. *Cochran v. Veneman*, 359 F.3d at 270; App. 19a. Such a reading of *United Foods* is illogical. This Court's rationale in *United Foods* was based on the mushroom industry not being otherwise regulated; it was not based on the fact that the Mushroom Act did not otherwise regulate the mushroom industry.

Respondents have argued that this is irrelevant because they have chosen not to participate in a dairy cooperative and assert that they "can and often do" sell their milk to processors that are not regulated by federal milk marketing orders. Whether Respondents sell to processors regulated by a federal order or to Pennsylvania processors regulated by Pennsylvania's order, Respondents operate in a market environment that is comprehensively regulated at both the federal and state levels. Moreover, Respondents have no choice but to have their marketing autonomy dramatically limited the comprehensive regulation of the dairy industry. John Donne wrote that "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main." This surely is the case with Respondents and their milk marketing activities. They do not operate in a vacuum and they cannot avoid being impacted by the milk marketing regulation that is pervasive in the United States. This Court's *Glickman* analysis looks at whether there is a broad regulatory scheme in which individual marketing autonomy is restrained. That aptly describes the marketing environment facing the Respondents.

The Dairy Act involves "questions of economic policy for Congress to resolve" and not a "First Amendment issue for the courts to resolve." *Glickman*, 521 U.S. at 468. The Dairy Act is "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.* The Dairy Act does not violate the First Amendment. This Court should review the Third Circuit's judgment.

II. GENERIC ADVERTISING FUNDED BY THE DAIRY ACT PRODUCES GOVERNMENT SPEECH BECAUSE CONGRESS DECIDED ON THE MESSAGE, CREATED A GOVERNMENTAL ENTITY TO FORMULATE IT, AND VESTED ULTIMATE CONTROL OVER THE MESSAGE IN AN OFFICIAL WITH POLITICAL ACCOUNTABILITY—THE SECRETARY OF AGRICULTURE

"[W]hen [the government] is the speaker or when it enlists private entities to convey its message . . . it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Here the government has chosen to say "got milk?" to encourage the consumption of fluid milk and "Ahh, the power of Cheese" to encourage the consumption of cheese. If Respondents disagree with these government messages, their recourse is at the ballot box, not the courthouse. *Griffin v. Dep't of Veterans Affairs*, 288 F.3d 1309, 1324-25 (Fed. Cir.), *cert. denied*, 537 U.S. 947 (2002).

A. The Government Speech Doctrine

The First Amendment restricts the government's ability to prevent or restrain private speech. It does not prevent the government from contributing its own voice to the marketplace of ideas. Indeed, the government regularly speaks to promote particular objectives, such as to encourage people to join the armed forces, to conserve energy, or to stop smoking.

When it does so, it does not violate the First Amendment even though pacifists, power companies, or tobacco farmers disagree with the government's chosen messages. Just as the "Be All You Can Be" military recruiting campaign is government speech conveying the message that you should join the armed forces, the "got milk?" dairy advertising campaign is government speech.

In *Rust v. Sullivan*, 500 U.S. 173, 194-200 (1991) this Court upheld federal regulations prohibiting recipients of Title X funding from promoting or advocating abortion as a method of family planning. This Court later interpreted its holding in *Rust* as relying on the rationale that "the counseling activities of the doctors under Title X amounted to government speech" in that the government decided on the message and "disbursed public funds to private entities to convey a government message." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Where the government passes a law, a component of which is to publish a government message, where the government maintains final authority over the content of that message, and where the government bears ultimate responsibility for that message, the message—the speech—is that of the government, regardless of whether the particular messenger is a public or a private entity. *Cf. Griffin v. Dep't of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir.), *cert. denied*, 597 U.S. 947 (2002)(ruling that when it speaks "[t]he government is entitled to full control over its own speech, whether it speaks with its own voice or enlists private parties to convey its message, and the remedy for dissatisfaction with its choices is political rather than judicial").

In *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1012 (9th Cir. 2000), the "government speech" issue arose in the context of notices posted on high school bulletin boards. The Ninth Circuit decided that who controls the message determines whether the speech is government

speech. 228 F.3d at 1009-12. Because the school's principal controlled the messages posted on the school's bulletin boards, those messages constituted government speech even though there was no explicit statement on the bulletin boards that they contained official school messages. *Id.* at 1012. The Ninth Circuit thus suggests that the relevant inquiry is to focus on who controls the message.

In *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), this Court said:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also Lee v. Weisman, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Indeed, effective government would grind to a halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. *See Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) (discussing the "practical problems of excluding the government from ideological debate"). As Justice Scalia has put it:

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects . . . . And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] offic-

> ials further their (and, in a democracy, our) favored point of view by achieving it directly . . . ; or by advocating it officially . . . ; or by giving money to others who achieve or advocate it . . . . None of this has anything to do with abridging anyone's speech.

National Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1999)(Scalia, J. concurring).

The First Amendment does not provide a legal basis for objecting to government speech. While the First Amendment prohibits the government from regulating the speech of others based on its content, this Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message*." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (emphasis added); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. at (1995) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances * * * in which the government used private speakers to transmit specific information pertaining to its own program") (citations and quotation omitted). As then-Judge Scalia said in *Block v. Meese*: "The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate." 793 F.2d at 1314 (quotation omitted).

B. This Court Has Not Decided Whether The Government Speech Doctrine Applies To Commodity Promotion Laws

This Court in *United Foods* left unresolved the question of whether generic advertising conducted pursuant to a commodity promotion and research program is government speech and thus immune from First Amendment inquiry. 533

U.S. at 416-417. In *United Foods* this Court implicitly recognized the possible application of the government speech doctrine to such cases, while declining to address the government's argument that the generic advertising for mushrooms was govern-ment speech because the argument was not raised at the court of appeals. *See id.* at 416-417; *see also id.* at 428 (Breyer, J., dissenting) (noting that the majority's failure to address the issue left "uncertainty as to how much governmental involvement will produce a form of immunity under the 'government speech' doctrine"). Similarly, in *Glickman*, this Court did not consider the government speech argument because the government did not make the argument in that case, only an *amici* did. *See* 521 U.S. at 482 n. 2 (Souter, J., dissenting).

In *United Foods*, this Court said:

> The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. . . . The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, *although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval pro forma.* This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

533 U.S. at 416-17 (emphasis added). The record below demonstrates that the Secretary's oversight of the Dairy Board and DMI is both real and vigorous.

C. Dairy Board Is The Government For First Amendment Purposes

To decide whether certain speech is government speech one must first determine who is doing the speaking. If the government is doing the speaking, then the speech is government speech. *Cf. Downs v. Los Angeles Unified School*

District, *supra*. This Court provided clear guidance on how to determine if the government is speaking in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), where it held that Amtrak is an arm of the government subject to the constraints of the First Amendment when it restricts private speech. Amtrak had refused to allow *Lebron* to display an advertisement with political overtones. The Court stated, "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment." *Id.* at 400.

The three factors that led this Court to conclude that Amtrak was "part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law, (2) furtherance of governmental objectives, and (3) retention of appointment authority over the entity created—are all present here. Like Amtrak, the Dairy Board is "part of the Government for purposes of the First Amendment."

The Dairy Board satisfies the first factor because it was created by a special statute—the Dairy Act. The Dairy Board satisfies the second factor—being formed to further government objectives. The Dairy Board was created in 1983 to advance the declared policy of Congress "to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." 7 U.S.C. § 4501(b); App. 49a.

These "governmental objectives" (*Lebron*, 513 U.S. at 398) were reaffirmed with the passage of the Federal Agricultural Improvement and Reform Act of 1996, whereby Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new

markets for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws" such as the Dairy Act. 7 U.S.C. § 7401(b)(1). Congress specifically found that the Dairy Act and other commodity promotion laws operate "under the required supervision and oversight of the Secretary of Agriculture . . . [to] further specific national governmental goals, as established by Congress." 7 U.S.C. § 7401(b)(8). In short, the Dairy Act was enacted to advance substantial governmental objectives and the advertising it produces directly advances those governmental objectives established by Congress. *Id.*

As to the third *Lebron* factor—the Dairy Board satisfies this requirement because the Secretary of Agriculture appoints all members of the Dairy Board. 7 U.S.C. § 4504(b); App. 53a. The record below is replete with evidence of the active oversight and control over the Dairy Board and DMI exercised on essentially a daily basis by the Secretary of Agriculture's designee and other USDA employees. App. 124a-125a; 95a-96a; 101a-103a; 112a-123a; 126a-137a.

In addition, all "patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of [the Dairy Order] * * * *shall be the property of the U.S. Government as represented by the Board*, and shall . . . inure to the benefit of the Board." 7 C.F.R. § 1150.184; App. 89a (emphasis added). Moreover, as noted above, Congress authorized appropriations to "carryout and the provisions of the Dairy Act." 7 U.S.C. § 4513; App. 66a. This confirms that the Dairy Board is the government for First Amendment purposes and the speech it produces is government speech.

D. Even If Dairy Board Is Not The Government, It Produces Government Speech

Even if this Court were to conclude that the Dairy Board is not the government for First Amendment purposes, the advertising of the Dairy Board nevertheless constitutes government speech. When the Dairy Board speaks, its does so on behalf of the government. The content of Dairy Board advertising is determined by Congress, and brought to the marketplace under the active oversight and control of the USDA.

The government may enlist private entities "to convey a governmental message" or "transmit specific information pertaining to its own program" without implicating the First Amendment. *Rosenberger*, 515 U.S. at 833. In determining whether the speech activities at issue in *Keller* constituted government speech, this Court focused on the entity that conveyed the message—the California State Bar—and not on the nexus between the state bar's members and the messages to which they objected. Because this Court concluded that the California State Bar was not like a typical government agency or official, who "[is] expected as part of the democratic process to represent and espouse the views of the majority of [its] constituents," 496 U.S. at 12, and because the state legislature did not specify that the State Bar should favor gun control or nuclear freeze messages, it concluded that those messages were not government speech. *Id.* at 13-15.

This case is distinguishable from *Keller*. Here, unlike *Keller*, the message being conveyed—dairy promotion—was formed in the first instance by Congress "as part of the democratic process." 496 U.S. at 12. The Dairy Board was created by Congress with the express purpose of conveying that *particular* message to the public. It does so pursuant to precise government regulations set forth in the Dairy Order, 7 C.F.R. pt. 1150, and only under the extensive supervision,

oversight, and control of the Secretary of Agriculture, an official with full political accountability, and her designees.

In contrast, no such governmental control characterized the activities of the State Bar in *Keller*. The messages at issue there represented the views of a particular group—the Bar—on a wide and changing array of issues, such as endorsing gun control, a nuclear weapons freeze, and the like. 496 U.S. at 15. The Dairy Act prohibits the Dairy Board from conducting activities of an advocacy nature, 7 U.S.C. § 4504(j), and limits its permitted speech activities to commercial promotion and advertising. Here the message was established by the representative of the people—the Congress—and is implemented by the Secretary, a politically appointed official. The Dairy Act produces government speech.

E. The Source Of Funding Of Speech Does Not Change Its Character

Respondents have argued that in evaluating whether the Dairy Act's generic advertising scheme constitutes "government speech," one must take into account whether the speech is funded by general tax revenues or by targeted assessments paid by members of one group. This argument is misplaced. The key inquiry is whether the government is controlling the advertising messages produced by the Dairy Board. The District Court record contains substantial, unrebutted evidence that the Secretary exercises extensive oversight and control over all aspects of the Dairy Promotion Program, thus assuring that the Dairy Board's message is the government's message. App. 101a-103a; 112a-139a.

Furthermore, with respect to funding, it is within the purview of the Congress to decide how it chooses to fund its own speech—whether by means of general tax revenues or through a special assessment imposed on a smaller group of citizens. When the government imposes taxes, assessments, or exactions on all taxpayers or some smaller group to fund government speech, the speech remains government speech.

See Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000). As this Court has recognized, "The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Id.* (emphasis added). It necessarily follows from this that the government may spend the money it raises to engage in "speech and other expression to advocate and defend its own policies." *Id.*; *see also Rosenberger*, 515 U.S. at 833 ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). While some may disagree with what the government has choosen to say, such a disagreement does not give those who disagree a First Amendment right to silence the government or excuse themselves from having to pay for the message.

In *Southworth*, a case concerning the constitutionality of a student activity fee that was used in part to fund organizations engaging in ideological speech, this Court noted that because "[t]he University ha[d] disclaimed that the speech is its own," the case did not present the question of whether the challenged program could be sustained as government speech. 529 U.S. at 229. This Court went on to note, however, that "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* This Court recognized that this would be government speech even though the source of funding was tuition dollars, not general tax revenues. The source of funding of the "government speech" was not a concern in *Southworth*, nor should it be a concern here. It remains the government's message no matter the source of funding. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085 (E.D.Cal. 2003), *appeal pending*, (9th Cir.)(holding that specialized tax assessed on wholesale tobacco sales to fund California's anti-tobacco advertising campaign produced government speech); *Charter v. USDA*,

230 F.Supp.2d 1121 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.)(Beef Act promotions constitute government speech).

Society frequently calls on its members to pay taxes, dues, or assessments to support various entities both governmental and nongovernmental and this Court has not suggested that the government speech doctrine applies only to speech funded with general tax revenues. No one thinks that everyone who makes such a payment thereby endorses the agenda of the recipient, because the connection between the payment of an individual's dues and the views to which he objects is factually so remote. *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring in the judgment). As Justice Harlan said:

> What seems to me obvious is the large difference in degree between, on one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Id. at 858.

The facts of this case are a far cry from a case in which the government attempts to compel adherence to its own message by its citizens, as in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley v. Maynard*, 430 U.S. 705 (1977), where motorists were required to bear *on their own vehicle license plates* an ideological state motto they found morally objectionable.

Respondents here face no such ideological imposition. The Dairy Act simply requires them to pay a fee to fund the

government message. It neither "compel[s] [them] to utter what is not in [their] mind[s]," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. No one has asked Respondents to express their personal support for the generic promotion of dairy, similar to *Barnette*, or to place a "got milk?" bumper sticker on their cars, similar to *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant citizen is worlds removed from compelling a citizen to contribute financially to support the government's pro-milk message spoken to the public by the government itself. *See NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.'") (quoting *Wooley*, 430 U.S. at 717).

III. THE ASSESSMENT PROVISIONS OF THE DAIRY ACT ARE CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY APPLICABLE TO REGULATIONS OF COMMERCIAL SPEECH

The Dairy Act's promotion program satisfies the *Central Hudson* commercial speech test by directly advancing a substantial government interest in a manner well tailored to minimize constitutional concerns.

The regulation of commercial speech is constitutional if it: (1) promotes a substantial government interest, (2) directly advances that interest, and (3) is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556-57 (2001). The Dairy Act satisfies these requirements.

When it passed the Dairy Act, Congress stated that it was in the government's interest to create a program to promote milk and dairy products. Congress found that "milk and dairy

products are basic foods that are a valuable part of human diet, . . . and the maintenance and expansion of existing markets for milk and dairy products are vital to . . . the general economy of the Nation." 7 U.S.C. § 4501(a); App. 49a. Thus, the government has a substantial interest in maintaining and expanding markets for milk and dairy products.

Moreover, at the time of Congressional consideration of the legislation that became the Dairy Act, the federal milk price support program had fulfilled its statutory goals, but also had caused milk production to significantly outpace demand, thereby forcing the government to purchase and store nearly 20 billion pounds of dairy surplus. App. 103a.

To reduce the amount of powdered milk, butter, and cheese the government was required to buy and store under the price support program, Congress passed the Dairy Act in 1983. The purpose of the Dairy Act was to stimulate demand for fluid milk and other dairy products and reduce the amount of dairy products the government was required to purchase and store. S. Rep. No. 98-163 at 18, 19; App. 93a.

The Dairy Act directly advances these substantial government interests. For example, as this Court has recognized, advertising creates and increases demand, which is necessary for maintaining and expanding markets. *See Lorillard Tobacco*, 533 U.S. at 557. "There is an immediate connection between advertising and [product] demand . . . ." *Central Hudson*, 477 U.S. at 569. The Ninth Circuit has also taken note of the clear link between dairy advertising and dairy demand. *Gallo I*, 185 F.3d at 977. That Court stated that "[t]he use of generic advertising of milk and milk products . . . accomplishes the Marketing Act's and Marketing Order's goal of maintaining the present market for, and creating new or larger markets for, California milk and milk products." *Id.* The same is true for the advertising conducted pursuant to the Dairy Act.

Also, the Dairy Act is no more extensive than necessary to serve that interest. To satisfy this *Central Hudson* requirement, there must be a reasonable fit between the means and ends and the means should be narrowly tailored to accomplish the goal. *Lorillard*, 533 U.S. at 557; *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Just as the Third Circuit found that the Beef Promotion Act "infringes on the contributors' rights no more than necessary to achieve the stated goal," *Frame*, 885 F.2d at 1137, the Dairy Act is similarly well tailored to affect the rights of dairy producers no more than is necessary to achieve the Congressional objectives.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
Appellants,

v.

ANN VENEMAN, Secretary, U.S. Department of Agriculture; NATIONAL DAIRY PROMOTION BOARD Appellees And FRED LOVELL; LEE GREENWALT; JACKIE ROOT; EARNEST NORMAN; STEPHEN MASHALL; CECIL MOYER; JAMES VANBLARCOM,
Intervenors-Appellees.

January 12, 2004, Argued
February 24, 2004, Filed

JUDGES: Before: Sloviter, Rendell and Aldisert, *Circuit Judges.*

The American public is very familiar with the "Got Milk?™ " ads on television and in the print media.

This appeal requires us to decide whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions. Implicated here are general First Amendment precepts that protect the right to refrain from speaking and the right to refrain from association, and the specific issue of whether the government may compel individuals to fund speech with which they disagree.

Joseph and Brenda Cochran are independent small-scale dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They alone determine how much milk to produce, how to sell and market it and to whom it will be sold.

The Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* ("Dairy Promotion Act," "Dairy Act," or "Act"), provides for the creation of the Dairy Promotion Program and authorizes the Secretary of the Department of Agriculture ("Secretary") to issue an order creating the National Dairy Promotion and Research Board ("Dairy Board") to administer the program. To finance the promotional projects and the Dairy Board's administration of them, the Dairy Act and implementing order require every milk producer in the United States to pay mandatory assessments of 15 cents per hundredweight of milk sold.[1] *Id.* § 4504(g); 7 C.F.R. § 1150.152. Neither the Dairy Act nor the order permits dissenting milk producers to withhold contributions for advertising or promotional projects to which they object.

The Cochrans object to paying these assessments and filed an action in the United States District Court for the Middle District of Pennsylvania seeking a declaration that the Dairy

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[1] The Dairy Act provides:

> The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall . . . collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
>
> . . .
>
> The rate of assessment for milk . . . prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

7 U.S.C. § 4504(g).

Actviolates their First Amendment rights of free speech and association.

The Cochrans operate a small commercial dairyfarm with approximately 150 cows on about 200 acres of land in Tioga County, north-central Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ what is known as "traditional" methods of dairy farming. Traditional dairy farming is less aggressive than larger-scale commercial farming, as it allows cows more room to move and graze and does not use the recombinant Bovine Growth Hormone (rBGH).[2] The Cochrans believe that their methods result in healthier cows, a cleaner environment and superior milk. The Cochrans object to the advertising under the Dairy Act because it conveys a message that milk is a generic product that bears no distinction based on where and how it is produced, and thereby forces them to subsidize speech with which they disagree.

As the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views, *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), or pay subsidies for speech to which individuals object, *Keller v. State Bar of California*, 496 U.S. 1, 9-10, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990); *Abood v. Detroit Dep't of Educ.*, 431 U.S. 209, 234, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977).

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[2] rBGH, also known as recombinant bovine somatotropin (rBST), is a genetically engineered growth hormone administered to dairy cows to boost milk production. Although the Food and Drug Administration has approved the use of rBGH for dairy production in the United States, consumer advocates and small dairy producers have questioned the longterm effects of the growth hormone on humans, cows and the environment. *See Barnes v. Shalala*, 865 F. Supp. 550, 554 (W.D. Wis. 1994).

The Cochrans' lawsuit named as defendants Ann Veneman in her official capacity as Secretary of the United States Department of Agriculture ("USDA") and the National Dairy Promotion Board, and sought declaratory and injunctive relief from the remittance of compelled assessments by all dairy producers to finance generic dairy advertisements. Alleging that the Dairy Act unconstitutionally compels them to subsidize speech with which they disagree, the Cochrans filed a motion for summary judgment contending that their case was controlled by the teachings of *United States v. United Foods*, Inc., 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001), in which the Supreme Court held that compelled subsidies under the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), 7 U.S.C. § 6101 *et seq.*, violated First Amendment protections.

The Government filed a motion to dismiss or, in the alternative, for summary judgment, arguing that this case is controlled by the teachings of *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), in which the Supreme Court upheld compelled subsidies for advertising California tree fruit under two marketing orders issued pursuant to the Agricultural Marketing and Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq*. The Government argued that the generic dairy advertising subsidized under the Dairy Act constitutes "government speech" and is therefore immune from First Amendment scrutiny and, moreover, that the Dairy Act is a species of economic regulation that does not violate the First Amendment.[3] The district court agreed with the Government and

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[3] Seven Pennsylvania dairy farmers who support the Dairy Promotion Act and Program petitioned the district court for leave to intervene as defendants and the district court granted the petition for intervention under Rule 24(a) of the Federal Rules of Civil Procedure. The Intervenors filed a cross motion for summary judgment, echoing the arguments made by the Government in its motion.

granted summary judgment in its favor, holding that the Dairy Act survives the deferential First Amendment scrutiny afforded to economic regulation. The Cochrans appeal.

We must decide whether the challenged communications pursuant to the Dairy Act are government speech and thereby immune from First Amendment scrutiny. If these communications are private speech, we must decide whether the Dairy Act violates the First Amendment free speech and association rights of dairy farmers. In doing so, we must consider the quantum of scrutiny to be applied to determine the validity of regulations, such as the Dairy Act, that compel commercial speech.

For the reasons that follow we reverse the judgment of the district court and hold that the compelled speech pursuant to the Dairy Act is private speech, not government speech, and is therefore subject to First Amendment scrutiny. We hold also that the Act violates the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. In so doing we conclude that the subsequent Supreme Court decisions of *Glickman* in 1997 and United Foods in 2001 severely dilute the precedential vitality of our ultimate holding in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), in which we concluded that the compelled assessments pursuant to the Beef Promotion Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, survived First Amendment scrutiny.

I.

In determining the side on which the axe must fall—on Glickman or on United Foods—we must start by examining why the Supreme Court went one way in its first case of Glickman and the other way in its subsequent decision in United Foods.

A.

In Glickman, producers of California tree fruits (including nectarines, plums and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, that imposed mandatory assessments on fruit tree growers to cover the expenses associated with the marketing orders, including the costs of generic advertising. 521 U.S. at 460. The Court emphasized that besides the advertising decisions, the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469.

In addition to advertising, the marketing orders for California fruit tree growers provided for mechanisms for establishing uniform prices, limiting the quality and quantity of tree fruit that could be marketed, determining the grade and size of the fruit and orderly disposing of any surplus. *Id.* at 461. The orders also authorized joint research and develop ment projects, quality inspection procedures and standardized packaging requirements—all of which were financed by the compelled assessments. *Id.*

The Court determined that the collective arrangement of the fruit tree farmers was similar to the union arrangement at issue in *Abood v. Detroit Board of Education*, 431 U.S. 209,

52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), and the bar association at issue in *Keller v. State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990). In *Abood*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Similarly, in *Keller*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a state bar program was constitutionally justified by the State's interest in regulating the legal profession and improving the quality of legal services. 496 U.S. at 13. Finding parallels between the facts of *Abood* and *Keller*, in *Glickman* the Court concluded that as part of the AMAA marketing orders, the compelled assessments for generic advertising of California tree fruit were ancillary to a comprehensive marketing program, and therefore were "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 521 U.S. at 477.

"The opinion and the analysis of the Court [in *Glickman*] proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412.

B.

Four terms later, in United Foods the Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Act, 7 U.S.C. § 6101 *et seq.*, violated the First Amendment. 533 U.S. at 416. The Court distinguished the statutory context at issue in United Foods from that in

Glickman, explaining that under the stand-alone Mushroom Act "the compelled contributions for advertising are not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the Mushroom Act. *Id.* at 415. As such, "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413 (citing *Abood*, 431 U.S. at 209; *Keller*, 496 U.S. at 1). The Court concluded that the compelled assessments pursuant to the Mushroom Act were unlike the situation in *Abood*, *Keller* and *Glickman*, in which:

> Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.

Id. at 414.

Fundamentally, the Court noted that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415. Concluding that the only program the compelled contributions for advertising pursuant to the Mushroom Act serve "is the very advertising scheme in question," the Court ruled that the compelled assessments were not permitted under the First Amendment. *Id.* at 416.

C.

Guided by the express reasoning of the Court in *Glickman* and *United Foods*, we must first look at the broader statutory scheme presented in the Dairy Act, or more specifically, we must ascertain whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules" for purposes other than

advertising, or speech. *United Foods*, 533 U.S. at 412. It is to a description of the Dairy Act we now turn.

II.

The Dairy Promotion Program set forth in the Dairy Act is one in a long series of federal "checkoff" programs for promoting agricultural commodities.[4] Enacted in 1983, the Dairy Act authorizes the Secretary of Agriculture to establish a program for the "advertisement and promotion of the sale and consumption of dairy products [and] for research projects related thereto." 7 U.S.C. § 4504(a). The declared purpose of the Dairy Act is to provide for "an orderly procedure for financing . . . and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace . . . ." *Id.* § 4501(b).

The Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme. It directs the Secretary to appoint a Dairy Board composed of private milk producers to administer the Dairy Promotion Program. Id. §§ 4504 (b) & (c). The Act provides that every milk producer must pay a mandatory assessment of 15 cents per hundredweight of milk sold to finance the promotional programs and the Dairy Board's administration of them.

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[4] Other stand-alone checkoff programs established by Congress which have been subject to First Amendment challenges include: Beef Research and Information Act of 1976 ("Beef Act"), 7 U.S.C. § 2901 *et seq.* (invalidated by *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003) (reh'g den. Oct. 16, 2003)); Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. § 4801 *et seq.* (invalidated by *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003)); Mushroom Act, 7 U.S.C. § 6101 *et seq.* (invalidated in 2001 by *United Foods*, 533 U.S. at 405). Cf. *Glickman*, 521 U.S. at 457 (upholding as constitutional marketing orders for California tree fruits promulgated pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, which included compelled assessments to fund, among other things, generic advertising).

Pursuant to the authority provided in 7 U.S.C. § 4503(a), the Secretary issued an order in March 1984 establishing the Dairy Board, 7 C.F.R § 1150.131, and the Board proceeded to collect the mandatory assessments from all milk producers, 7 C.F.R § 1150.152. For the Cochrans, the compelled assessments amount to roughly $ 3,500 to $ 4,000 per year.

The Dairy Board is composed of commercial milk producers who are nominated by "eligible associations," which are private associations of milk producers that engage in dairy promotion at the state and regional level. *Id.* §§ 1150.133, 1150.273. The primary consideration in determining an organization's eligibility is "whether its membership consists primarily of milk producers who produce a substantial volume of milk" and whose overriding interests lay in the production and promotion of fluid milk and other dairy products. *Id.* § 1150.274(b).

In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation that now oversees and administers the promotional activities of the Dairy Act. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association ("UDIA"), which is an association of state and regional dairy promotional programs that are considered "Qualified Programs" under the Dairy Act. "Qualified Programs" are local promotional programs, many of which preexisted the Dairy Act, to which milk producers may contribute a portion of the money they would otherwise pay in assessments under the Act. *See* 7 U.S.C. § 4504(g)(4), 7 C.F.R. §§ 1150.152(c), 1150.153. The Act thus requires dairy farmers to pay either the full 15 cent per hundredweight assessment to the Dairy Program or part to the Dairy Program and part to a Qualified Program that engages in state or regional generic advertising. The Dairy Board and the DMI Board are composed entirely of private milk producers and other private parties, and the Dairy Promotion Program is funded entirely by private milk producers through

the compelled assessments. The Dairy Promotion Program website explains: "Checkoff programs are funded by dairy producers—NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight."[5]

The Secretary's oversight responsibilities pursuant to the Dairy Act are conducted by the Agricultural Marketing Service ("AMS"), a division of the USDA, and are limited to ensuring that the Dairy Promotion Program is in compliance with the Act. *See, e.g.*, 7 U.S.C. § 4507(a) (authorizing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). AMS guidelines explain that "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." AMS, Guidelines for AMS Oversight of Commodity Research and Promotion Programs 1 (1994). The Secretary's oversight functions for the Dairy Program are funded by the compelled assessments. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b). Moreover, the dairy producers, not the government, control whether the Dairy Promotion Program continues via a referendum process. 7 U.S.C. § 4506(a).

All advertising and promotional programs that are financed by the compelled assessments under the Dairy Act and created by the Dairy Board and DMI promote milk as a generic product. 7 C.F.R. § 1150.114. Among advertising campaigns financed by the Dairy Promotion Program are "Got milk? tm "and "Ahh, the power of cheese."

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[5] Dairy checkoff Works!—How the Dairy Checkoff works, available at http://www.dairycheckoff.com/howitworks. htm (last visited June 3, 2002 (J.A. at 231)).

III.

In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws. The district court noted four federal laws in particular that it deemed relevant to this case: (1) the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.*; (2) the Agriculture Act of 1949, 7 U.S.C. § 1446; (3) import control regulations under 19 U.S.C. § 1202; and (4) the Capper-Volstead Act, 7 U.S.C. § 291.

An examination of the provisions of these statutes is crucial to determine whether these legislative acts, in conjunction with the Dairy Act, bring the case at bar within the rubric of Glickman—i.e., requiring that milk producers are bound together and obligated by statute to market their products according to some set of cooperative rules. The district court held that such a cooperative arrangement exists for dairy producers, but we conclude otherwise.

A.

The AMAA, 7 U.S.C § 608c, permits the Secretary to issue marketing orders that regulate the handling and sales of various agricultural commodities, including milk, in different regions of the country. For milk, the marketing orders establish a classification system and set minimum prices that handlers must pay in the regions in which the orders apply. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq*. The AMAA applies only to "handlers"[6] of the covered commodities. 7 U.S.C. §§ 608c(1) & (5)(A). "Producers," such as dairy farmers in general, and Joseph and Brenda Cochran in particular, are specifically exempted from the application of marketing orders. *Id.* § 608c(13)(B) (stating that no marketing

[6] A handler is a person who purchases milk from a producer in an unprocessed form for the purpose of processing it.

order "shall be applicable to any producer in his capacity as a producer").

Although milk marketing orders restrict the decisions of dairy handlers, they do not interfere with the decisions of dairy producers, such as the Cochrans, with regard to how much milk to produce, sell or whether they must sell milk at all to dairy handlers. *See id.* § 608c(5).[7] At least 25 percent of the milk sold in the United States is sold outside of federal milk marketing orders. The Cochrans are able to and do sell much of their milk outside any milk marketing order.

B.

The Agricultural Act of 1949, 7 U.S.C. § 1446, establishes a price support program wherein manufacturers and processors of cheese, nonfat dry milk and butter can sell those products to the federal government as buyer of last resort. Producers of fluid milk, such as the Cochrans, however, are not covered by the Agricultural Act and are not permitted to sell their product to the government under the price support program.

C.

Similarly, the import control regulations under Chapter 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, subject a multitude of commodities and prod-

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[7] Milk marketing orders under the AMAA are implemented on a regional basis. *See* 7 U.S.C. § 608c(11). Not all parts of the country are covered, and some states—including California, Virginia, Maine and Montana—are outside the territory of any milk marketing order. Portions of Pennsylvania fall within two different milk marketing regions, the Northeast Area and the Mideast Area. *See* 7 C.F.R. §§ 1001.1, 1033.1. Certain portions of the state, however, including where the Cochrans are located, fall outside of any federal milk marketing order. The effect of the AMAA provisions is that any particular producer's milk is subject to a marketing order only if the producer chooses to sell to a regulated handler in an area covered by a marketing order. *See id.* §§ 1001.13, 1033.13.

ucts to annual import quotas. Although certain dairy products are included - namely butter, dry milk and cheese—fluid milk is not. *See* 7 C.F.R. Pt. 6, Apps. 1, 2, 3.

D.

Finally, the Capper-Volstead Act, 7 U.S.C. § 291, permits producers of agricultural products—including milk, mushrooms and others - to enter into manufacturing and marketing cooperatives without fear of violating antitrust laws. It does not, however, require producers to enter into such cooperatives, as federal law expressly protects producers' freedom not to join any cooperative. *See Agricultural Fair Practices Act of 1967*, 7 U.S.C. § 2301 *et seq.*; *Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477-478, 81 L. Ed. 2d 399, 104 S. Ct. 2518 (1984). The Cochrans do not belong to any cooperatives protected by the antitrust exemption created by the Capper-Volstead Act.

E.

Considering the foregoing provisions of the Dairy Act and other statutes governing the dairy industry, we now turn to the First Amendment issues that constitute the heart of this appeal.[8]

IV.

We must first consider whether the compelled assessments generated under the Dairy Act constitute private or government speech. Although the district court did not address this

[8] The United States District Court for the Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 based on the Cochrans' First Amendment claim. We have jurisdiction in this timely appeal pursuant to 28 U.S.C. §§ 1291. We review de novo the constitutionality of an Act of Congress. *Dyszel v. Marks*, 6 F.3d 116, 123 (3d Cir. 1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment is plenary. *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 169 (3d Cir. 1999).

issue, the Government contended before the district court that the expressions generated under the Dairy Act constitute government speech. Therefore, the issue is subject to our review.

The First Amendment prohibits the government from regulating private speech based on its content, but the Court has "permitted the government to regulate the content of what is or is not expressed when [the government] is the speaker or when [the government] enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).

The Court has not decided whether speech generated under commodity promotion laws such as the Dairy Act constitutes government speech and is thereby immune from First Amendment scrutiny.[9] But in Frame, this court did meet the issue. 885 F.2d at 1132-1133.

In line with our sister Courts of Appeals in *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157, 161-162 (6th Cir. 2003) and *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 720 (8th Cir. 2003), we held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers. *Frame*, 885 F.2d at 1132-1133. Recognizing that the Beef Promotion Program directed the Secretary to appoint all Cattlemen Board members and approve all budgets, plans, contracts and projects entered into by the Board, this court nevertheless

[9] The two decisions of the Court involving commodity promotion programs do not address the issue of government speech. In *Glickman*, the Secretary of Agriculture waived the issue by not pursuing it before the Supreme Court. 521 U.S. at 482 n.2 (Souter, J., dissenting). In United Foods, the Court refused to address the issue because the government failed to raise it before the Court of Appeals. 533 U.S. at 416-417.

concluded that "[t]he Secretary's extensive supervision . . . does not transform this self-help program for the beef industry into 'government speech.'" We explained:

> The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers."

Id. at 1133 (quoting 7 U.S.C. § 2905(b)(3) & (4)). The government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, and under the precedent established in Frame, the Secretary's supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into "government speech." On the dairy checkoff website, the government itself describes the Dairy Promotion Program as a non-governmental program, financed and directed by dairy farmers.

Although this court's First Amendment discussion and ultimate holding in Frame have been abrogated by Glickman and United Foods, none of the Court's subsequent decisions regarding "government speech" undermine our analysis of that issue in Frame.[10] Accordingly, we conclude that this is a

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[10] Notwithstanding the Government's assertions to the contrary, we are not convinced that any decisions rendered by the Court in the years following our decision in Frame require us to cast aside the government

private speech case, and thus is not immune from First Amendment scrutiny.

V.

The teachings of United Foods require us to decide whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules[,]" 533 U.S. at 412, for purposes other than advertising, or speech. That is our next task.

The Cochrans contend that the Dairy Act violates their First Amendment free speech and association rights by compelling them to subsidize generic advertising that promotes milk produced by methods they view as wasteful and harmful to the environment.

The First Amendment protects the right to refrain from speaking and the right to refrain from association. *See, e.g.*, *Wooley*, 430 U.S. at 714. Moreover, the government may not compel individuals to fund speech or expressive associations with which they disagree. *See United Foods*, 533 U.S. at 411. "First Amendment values are at serious risk if the govern-

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speech analysis we performed in Frame. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001) (concluding that restrictions placed on the private speech of a lawyer receiving government funding from the Legal Services Corporation were unconstitutional); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000) (stating in dicta, in a case where the government affirmatively disavowed any connection to the speech involved, that a government speech analysis might apply if a state university used general tuition money to fund speech attributed to the school or its administrators); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995) (holding that Amtrak is a government actor for First Amendment purposes because it was created by statute to further government objectives and the government maintained substantial control over its daily operations); *Rust v. Sullivan*, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (concluding that the government can prevent private doctors at family planning clinics that receive federal funding from providing abortion counseling).

ment can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny." *Id.* The individual's disagreement can be minor, as "[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 767, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993)). When, however, regulation compelling funding for speech is ancillary to a broader collective enterprise that otherwise restricts the individual's market autonomy, it is considered "economic regulation," which enjoys a "strong presumption of validity" when facing a First Amendment challenge. *See Glickman*, 521 U.S. at 477.

We conclude that in upholding as constitutional the compelled subsidies under the Dairy Act, the district court misapplied *Glickman* and misconstrued the effect of the "entire regulatory scheme applicable to milk producers . . . ." (District Court Op. at 15 n. 5.) The Court in United Foods made clear that *Glickman* applied only in circumstances similar to *Abood* and *Keller*—in which individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid scheme of economic regulation." 533 U.S. at 412.

The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative. Although the dairy industry is "regulated" in the sense that it is subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in *Glickman*.

The Dairy Act is a free-standing promotional program that applies to all dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations. It is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for milk that encompasses all dairy producers. Indeed, the AMAA provision for milk marketing orders, which preexisted the Dairy Act, authorizes the Secretary and marketing administrators to create dairy promotional programs that literally would be ancillary to the regulatory aspects of the milk marketing orders. *See* 7 U.S.C. 608c(5)(I). Congress chose not to utilize this precise provision of the AMAA, however, and instead adopted an entirely separate program which does not operate in concert with any collective aspect of any milk marketing order.

Moreover, as independent small-scale dairy producers, the Cochrans are exempted from the regional marketing orders under the AMAA and have chosen not to enter into manufacturing and marketing cooperatives. They, and they alone, determine how much milk to produce, how to sell and market it and to whom it will be sold. Nevertheless under the Dairy Act they are compelled to pay assessments to subsidize generic dairy advertising, a form of speech with which they are in total disagreement. Cf. *Glickman*, 521 U.S. at 471 (noting that "none of the generic advertising conveys any message with which respondents disagree").

Furthermore, as the Court in United Foods determined that speech is the principal purpose of the Mushroom Act, so it is of the Dairy Act.[11] Indeed, "almost all of the funds collected

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[11] Congress' declared policy of the Mushroom Act was

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and

under the mandatory assessments are for one purpose: generic advertising." *United Foods*, 533 U.S. at 412. In *United Foods*, the Court made clear that compelled subsidies may not be upheld where they are only germane to a program whose "principal object is speech itself." *Id.* at 415.

We conclude, therefore, that being compelled to fund advertising pursuant to the Dairy Act raises a First Amendment free speech and associational rights issue. But our determination that the Act's compelled assessments for generic advertising implicate the Cochrans' First Amendment rights does not end our inquiry. As this court held in Frame, "[t]he rights of free speech and association are not absolute. Thus, we must next identify the proper standard for evaluating whether the statute . . . nevertheless passes constitutional muster." 885 F.2d at 1133.[12]

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coordinated program of promotion, research, and consumer and industry information designed to—(1) strengthen the mushroom industry's position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). Congress' declared purpose for the Dairy Act is

that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

[12] Upon concluding that milk producers are regulated to a similar degree as the California tree fruit growers in Glick-man, the district court applied a three-part test set forth by the Supreme Court in *Glickman*: (1) whether the Act imposes a restraint on the freedom to communicate; (b) whether the Act compels any person to engage in any actual or symbolic speech; (c) whether the Act compels dairy producers to endorse

VI.

This case is properly characterized as a compelled commercial speech case. *See United Foods*, 533 U.S. at 410; Frame, 885 F.2d at 1146 (Sloviter, J., dissenting). The Supreme Court, however, has left unresolved the standard for determining the validity of laws compelling commercial speech, and the circuit courts are divided on the issue. There are at least four variations in the judiciary's cumulative experience. One is the more lenient standard applied to commercial speech cases. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Another is the "germaneness" test of compelled speech cases. *See, e.g., Abood*, 431 U.S. at 235-236. Still another is an adaptation of the commercial speech standard. *See Livestock Marketing*, 335 F.3d at 722-723. And, in *Frame*, a pre-*Glickman* and pre-*United Foods* case, this court applied the stringent level of scrutiny for associational rights cases. 885 F.2d at 1134. We now summarize the various standards.

A.

In Central Hudson, the Supreme Court held that to evaluate the constitutionality of regulatory restrictions on commercial speech the Constitution requires only intermediate scrutiny—namely, that (1) the state must "assert a substantial government interest"; (2) "the regulatory technique must be in proportion to that interest"; and (3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564. Commercial speech is "expression

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or finance any political or ideological views. (District Court Op. at 16-18.) This test, however, is inappropriate because, like the Supreme Court in *United Foods*, we have concluded that the Dairy Act is not a species of economic regulation, as it is not ancillary to a more comprehensive program restricting the marketing autonomy of dairy farmers. In *United Foods* the Court did not apply this three-part test. Nor do we.

related solely to the economic interests of the speaker and its audience." *Id.* at 561.

But the Court has left open the question of whether Central Hudson's more relaxed First Amendment test applies to cases involving compelled commercial speech. In *United Foods* the Court stepped back from addressing the issue in ipsis verbis, explaining: "the Government itself does not rely upon Central Hudson to challenge the Court of Appeals' decision, . . . and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the Central Hudson test." 533 U.S. at 410. Nevertheless, in the earlier case of *Glickman*, the Court questioned the application of the commercial speech test to compelled speech cases:

> The Court of Appeals fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply Abood's "germaneness" test.

521 U.S. at 474 n. 18.

Indeed, in United Foods, notwithstanding its specific disclaimer regarding Central Hudson, the Court seemingly applied the "germaneness" test:

> The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects

> to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

533 U.S. at 415-416 (emphasis added).

As we previously explained, the purpose of the Dairy Act is in all material respects the same as that of the Mushroom Act at issue in *United Foods*, and the Dairy Act is not ancillary to a broader cooperative marketing regime like the fruit tree marketing orders at issue in *Glickman*. The compelled assessments for generic dairy advertising under the Dairy Act are germane to nothing but the speech itself. "[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412. It would thus seem that the Dairy Act would not survive Abood's germaneness test.

Other courts have applied the germaneness test to cases involving compelled assessments pursuant to promotional programs and have rejected the application of Central Hudson. *See, e.g., Michigan Port*, 348 F.3d at 163 (noting that "[e]ven assuming that the advertising funded by the [Pork] Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled"); In re Washington State Apple Adver. Comm'n, 257 F. Supp. 2d 1274, 1287 (E.D. Wash. 2003) (concluding that "[b]ecause the Commission's assessments do not restrict speech, it is inappropriate to apply the Central Hudson test for restrictions on commercial speech").

In *Livestock Marketing*, however, the Eighth Circuit concluded that an adaptation of the Central Hudson test applied, explaining that "Central Hudson and the case at bar both involve government interference with private speech in a commercial context." 335 F.3d at 722. All the same, the court concluded that the Beef Act did not survive the intermediate scrutiny of Central Hudson. *Id.* at 725-726. Relying on the

reasoning set forth in *United Foods*, the court determined that the beef checkoff program is in all material respects identical to the mushroom checkoff program, and concluded that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right." *Id.*

Finally, in *Frame*, which was decided before the teachings of both *Glickman* and *United Foods*, this court applied the stringent associational rights standard but nevertheless upheld the constitutionality of the Beef Act, 7 U.S.C. § 2901 *et seq.* Back in 1989, this court concluded that the government's interest in "maintaining and expanding beef markets proves . . . compelling[,]" and "[m]aintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1134-1135 (citations omitted).

Judge Sloviter, however, dissented on this issue in *Frame*:

> I doubt that the type of compelled speech at issue here can be justified on any basis. Nonetheless, I do not reach the majority's stringent associational rights standard because I believe that no justification can be found, even under the less exacting criteria adopted by the Supreme Court in evaluating the permissibility of regulation of commercial speech [in Central Hudson] . . . . While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign. Instead, . . . the messages represent the economic interests of one segment of the population . . . .

Id. at 1146-1147 (Sloviter, J., dissenting) (citations and internal quotations omitted).

As in *Frame*, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. Moreover, the Government contends that it has an interest in decreasing its obligation to purchase dairy products under the price support program, 7 U.S.C § 1446. We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman*, cut away the underpinning of this court's analysis in Frame. United Foods makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. 533 U.S. at 415. In *United Foods*, the Court concluded that the Mushroom Act's compelled subsidies would be unconstitutional even under the lesser scrutiny accorded to commercial speech. *Id.* at 410.

Although the Government's contention that it has a substantial interest in decreasing its obligation under the dairy price support program is somewhat unique from the government interest asserted in *United Foods*, this interest is undermined by the fact that as a stand-alone statute, the Dairy Act does not operate in conjunction with the price support program. Indeed, producers of liquid milk such as the Cochrans are not covered by the support program. Moreover, reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process. 7 U.S.C. § 4506(a).

We conclude, therefore, that the government's interest in promoting the dairy industry is not sufficiently substantial to justify the infringement on the Cochran's First Amendment free speech and association rights. As Judge Sloviter suggested in her dissent in Frame, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the govern-

ment's. We believe that the Supreme Court reached the same conclusion by ruling in United Foods that the compelled assessments pursuant to the Mushroom Act are not permitted by the First Amendment.

B.

In light of the reluctance of the Supreme Court in *United Foods* to enter the controversy over the applicable scrutiny for compelled commercial speech cases, however, we will follow suit. "[W]e find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 410.[13]

The compelled assessments for generic dairy advertising under the Dairy Act relate to speech and only to speech. Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412.

Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of *United Foods*, and accordingly hold that the Dairy Promotion Stabilization Act of 1983 does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran. The district court erred in sustaining the constitutionality of the Dairy Act on the basis of *Glickman*.

* * * * *

In sum, we conclude that the generic advertising pursuant to the Dairy Promotion Stabilization Act of 1983 does not constitute government speech and is therefore subject to First Amendment scrutiny. We hold that the Dairy Act violates the Cochrans' First Amendment free speech and associational

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[13] We reach this conclusion whether accepting the standard explicitly expressed in Frame or deciding that in view of the Court's discussion in *United Foods*, that standard is not longer controlling.

rights. Although the dairy industry may be subject to a labyrinth of federal regulation, the Dairy Act is a stand-alone law and the compelled assessments for generic dairy advertising are not germane to a larger regulatory purpose other than the speech itself.

The judgment of the district court sustaining the constitutionality of the Dairy Promotion Stabilization Act of 1983 will be reversed and the proceedings remanded with a direction to enter a decree in favor of Appellants in accordance with the foregoing.

CONCURBY: TRENDELL

CONCUR: TRENDELL, *Circuit Judge*, concurring.

I join in our opinion and judgment but write separately to register my view that, having found that the assessments do not pass muster under the Supreme Court's analysis in *United Foods*, and, having noted at the end of Pat IV that the compelled subsidies were assessed to support a program whose principal object was speech itself, we need not engage in the exercise of determining the "standard" regarding the extent of the government's interest for purposes of a commercial speech analysis under Central Hudson, as the opinion does at Part VI-A. Twice—in both *Glickman* and *United Foods*—the Supreme Court has questioned the need for engaging in a Central Hudson analysis.[14] And, I think it

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[14] The Court has not treated these cases as involving a discrete commercial speech issue, instead indicating that "[t]he question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410; *see also id.* (stating that, even if commercial speech is less protected than other speech, there is "no basis under either *Glickman* or our other precedents to sustain the compelled assessments," but refusing to consider "whether the Government's interest could be considered substantial for purposes of the Central Hudson test"); *Glickman*, 521 U.S. at 474 & n.18 (noting that it was "error for the [Ninth Circuit] to rely on Central Hudson

unnecessary to apply Central Hudson in light of the Court's analysis in United Foods.[15]

In *United Foods* the Court distinguished the situation it faced from the one it considered in *Glickman* by examining the following question: Is the challenged assessment part of a "broader regulatory system" that does not have speech as its primary object. 533 U.S. at 415. There appear to be two parts to this basic inquiry. First, are the plaintiffs part of a group that is "bound together and required . . . to market their products according to cooperative rules?" *Id.* at 412.

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for the purpose of testing the constitutionality of market order assessments for promotional advertising," and stating that the Ninth Circuit "fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). In fact, in United Foods the Court appears to explicitly endorse the applicability of the *Abood/Keller* germaneness test: "It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." 533 U.S. at 413 (citing *Abood* and *Keller*).

[15] The Sixth Circuit, in *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), also rejected the application of the Central Hudson test to an assessment created by a similar promotional program. I find that court's comments on this matter to be instructive: "[W]e find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by Central Hudson, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled. It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.* at 163 (citation omitted).

Second, is the assessment regulation related to and in furtherance of other nonspeechpurposes, carrying out other aspects to further other economic, societal, or governmental goals? *Id.* at 415. Even if the answer to the first question is "no," the assessment might nonetheless be permitted if it is not only related to speech. This second inquiry could signal consideration of "germaneness" if, in fact, other goals were implicated. But here, we answered "no" to both questions: we decided that the Cochrans did not surrender their freedom to make independent competitive choices to any collective enterprise, and we concluded that speech was the only purpose of the Dairy Act. Thus, it was purely "compelled speech," forbidden by *United Foods* under any level of scrutiny. 533 U.S. at 410. In fact, after discussing the various standards potentially applicable here, Judge Aldisert clearly states in the ensuing Part VI-B that under any level of scrutiny, the assessments for speech only do not pass constitutional muster given *United Foods*. The analysis in Part VI-A regarding the proper level of scrutiny is therefore unnecessary, and, I believe, dicta.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-01-0529

JOSEPH P. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, *et al.*,
Defendants,

and FRED LOVELL, *et al.*,
Intervenor Defendants.

March 24, 2003, Decided

OPINION

This is a declaratory judgment action brought pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 by Plaintiffs Joseph S. Cochran and Brenda S. Cochran ("Plaintiffs" or "the Cochrans"). Plaintiffs seek a declaratory judgment ruling that the Dairy Promotion and Research Program ("the Dairy Program") as set forth in Title I, Subtitle B of the Dairy Promotion Stabilization Act of 1983 ("the Stabilization Act" or "the Act"), Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4504(g) is an unconstitutional restriction on their right to free speech. Plaintiffs also seek an injunction against Ann Veneman, Secretary of the United States Department of Agriculture ("the Secretary") and the National Dairy Promotion and Research Board ("the Dairy Board") (together, "the Governmental Defendants"), enjoining the continued collection of the dairy checkoff assessment created pursuant to the Act.

Some of the advertisements funded by assessments collected pursuant to the provisions of the Stabilization Act currently under attack by Plaintiffs are part of the Milk Mustache/got milk? (R) campaign. The question presented to the Court, phrased in an equally ungrammatical fashion, may be reduced to: "Got Advertising Money for Milk?".

For the reasons that follow, we conclude that the Dairy Program and resulting diary checkoff assessment are not unconstitutional. Our holding will allow the American public to continue to view advertisements containing white mustachioed celebrities and other pop culture icons depicting the salutary effects of milk.

PROCEDURAL HISTORY:

Plaintiffs are dairy producers engaged in the production of milk for commercial use on a dairy farm located in Pennsylvania. They initiated this action by filing a complaint for declaratory and injunctive relief against the Governmental Defendants on April 2, 2002. The case was assigned to the Honorable James F. McClure Jr.

On June 6, 2002, Plaintiffs filed a motion for summary judgment. Thereafter, on June 14, 2002, the Governmental Defendants filed a motion to dismiss, or in the alternative, for summary judgment.

By Order issued August 6, 2002, this matter was transferred to the undersigned.

On January 13, 2003, this Court granted the Petition to Intervene brought by Fred Lovell, Lee Greenwalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vandblarcom ("the Intervening Parties" or "the Intervenors") on June 14, 2002. The Intervening Parties are dairy producers who, unlike Plaintiffs, support the dairy checkoff provision within the Act and believe it to be constitutional in all respects.

On January 21, 2003, the Intervening Parties filed their own motion for summary judgment.

Each of the pending motions has been fully briefed by the parties. Oral argument was held on March 19, 2003. This matter is now ripe for disposition.

STANDARD OF REVIEW:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[1] F.R.C.P. 56(c); *see also Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990). The party moving for summary judgment bears the burden of showing "there is no genuine issue for trial." *Young v. Quinlan*, 960 F.2d 351, 357 (3d Cir. 1992). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This burden may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325.

Rule 56 provides that, where such a motion is made and properly supported, the non-moving party must then show by

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[1] We note that the Governmental Defendants filed a motion to dismiss or, in the alternative, one for summary judgment. Because the Governmental Defendants presented matters outside of the pleadings for the Court's consideration within their motion, we will treat the motion as one for summary judgment under Federal Rule of Civil Procedure 56. *See* Fed.R. Civ.P. 12(b).

affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (citations omitted).

"The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "As to materiality, the substantive law will identify which facts are material." *Id.* at 248. Furthermore, a dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

STATEMENT OF RELEVANT FACTS:

The history of government involvement in the regulation of milk is an extensive one. "Federal programs have been deeply imbedded in the economic fabric of the United States dairy industry" since the late 1930s. S. Rep. No. 98-163, 13, reprinted in 1983 U.S.C.C.A.N. 1658, 1670.

There are four clearly interrelated federal programs involved:

> 1. The dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices.
>
> 2. The milk marketing order program which establishes minimum prices for fluid grade milk in most parts of the country.
>
> 3. Import controls which protect the price support program and keep the U.S. government from supporting world milk prices.
>
> 4. Federal cooperative policy which encourages the development of farmer-owned cooperatives but provides they may not use their market power to raise prices excessively.

Id. "The thrust of these programs has been to deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." *Id.*

In 1983, upon finding that "dairy products are basic foods that are a valuable part of the human diet," that "the production of dairy products plays a significant role in the Nation's economy," that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation," Congress created the Dairy Promotion Program. 7 U.S.C. §§ 4501(a)(1)-(4). In so doing, Congress declared

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through

> assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

In accordance with the guidelines set forth within the Stabilization Act, *see* 7 U.S.C. § 4505(b)(1), the Dairy Board was established by an order ("the Dairy Order") issued by the Secretary. *See* 7 C.F.R. § 1150.131(a). Currently, the Dairy Board consists of 36 milk producers, each appointed by the Secretary. *See* 7 C.F.R. § 1150.131(a), 7 C.F.R. § 1150.135; *see* also 7 U.S.C. § 4504(b)(2). Vacancies on the Dairy Board "occasioned by the death, removal, resignation, or disqualification of any member" are filled by the Secretary from a list of nominations made by the Board. 7 C.F.R. § 1150.136.

The powers of the Dairy Board are limited to those enumerated within the Stabilization Act. *See* 7 U.S.C. § 4504(c). Included among those enumerated powers are the authority to "administer the provisions of [the Dairy Order] in accordance with its terms and conditions," 7 C.F.R. 1150.139(b); *see also* 7 U.S.C. § 4504(c)(2), and to

> receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals.

7 C.F.R. § 1150.139(a); *see also* 7 U.S.C. § 4504(c)(1). The Act provides that the Dairy Board will "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related

thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes." 7 U.S.C. § 4505(a). Advertising created by the Dairy Board must be approved by the Agricultural Marketing Service ("AMS"), the division of the Department of Agriculture to which the Secretary has assigned this congressionally delegated role. (Gov. Defs.' Br. Supp. Summ. J., Ex. A at 1 and P VII(B)).

Of particular relevance to the case at bar, the Stabilization Act contains a provision for assessments which are to be issued to milk producers and thereafter paid to the Dairy Board:

> (g) Assessments
>
> (1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
>
> (2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter.
>
> (3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.
>
> (4) A milk producer or the producers' cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs

> intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983, of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hun= dredweight of milk marketed.
>
> (5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

7 U.S.C. § 4504(g). The Secretary issued an order in accordance with the Stabilization Act adopting the substance of the provisions listed above. *See* C.F.R. § 1150.152(a), (b) (requiring producers of milk to pay an assessment of 15 cents to the Dairy Board of reach hundredweight of milk marketed commercially). It is these provisions of the Act whose constitutionality are currently under review.

The Dairy Board is empowered to use funds collected through the assessments in order to fulfill its obligations under the Act. *See* 7 U.S.C. § 4504(f); *see also* 7 C.F.R. § 1150.140(i). None of these funds may, however, be utilized "in any manner for the purpose of influencing governmental policy or action" except insofar as those funds are used to make recommendations to the Secretary regarding proposed amendments to the Dairy Order. *See* 7 U.S.C. § 4504(j); *see also* 7 C.F.R. § 150.154.

In 1994, the Dairy Board joined with the United Dairy Industry Association ("UDIA"), a federation of Qualified Programs, in order to create Dairy Management Inc.

("DMI"), a District of Columbia corporation. (Gov. Defs.' Br. Supp. Summ. J., Ex. C P 1). The Dairy Board and UDIA "develop[] their marketing plans and programs through DMI."[2] (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 9). The DMI Board consists of an equal number of dairy farmers from the Dairy Board and the UDIA Board. *Id.* "The goals of DMI are to reduce administrative costs, to have a larger impact on the consumer, and to be better able to drive demand and help increase human consumption of fluid milk and dairy products." *Id.* All advertising created by DMI requires the approval of Dairy Programs, a component of AMS, prior to its dissemination to the public. *See* Mengel Decl. PP 2-3.

Plaintiffs operate a dairy farm in Tioga County, Pennsylvania,[3] where they produce milk for commercial use. They are subject to the Dairy Program's assessment, which costs them approximately $3,500 to $4,000 per year. *See* Cochran Decl. P 8.

The Cochrans operate their dairy farm autonomously using traditional farming methods. They are not members of any dairy cooperative. *See* Compl. P 25. They believe "that the use of sustainable agriculture in the form of less intensive

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[2] In the year 2000, DMI's program of generic promotion included "a full year of fluid milk print advertising through the Milk Mustache/got milk? (R) campaign." (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 21).

[3] A total of eleven federal marketing orders exist for milk. (Gov. Defs.' Br. Supp. Summ. J., Ex. L at 1). Plaintiffs emphasize, however, that Tioga County is not covered by a milk marketing order. *See* Compl. at P 6; *see also* 7 C.F.R. §§ 1001.2, 1033.2.

Still, the fact remains that "handlers regulated under federal milk orders process about 75 percent of all the milk marketed in the U.S." (Gov. Defs.' Br. Supp. Summ. J., Ex. K at 2). Indeed, "in total, more than 96 percent of the fluid eligible milk produced in the United States is priced under a state or federal marketing order." Second Mengel Decl. P 2.

herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet." Cochran Decl. P 10. Based upon the perceived differences in the farming methods used by the Cochrans and dairy producers at-large, the Cochrans object to the promotion of milk generically as "speech that denies there is any difference in milk." *Id.* P 13.

LEGAL ANALYSIS

Our holding hinges upon a determination of whether the facts in this case more closely parallel those in *Glickman v. Wileman Bros & Elliott*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), or in *United States v. United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001).

In *Wileman*, producers of California tree fruits (including nectarines, plums, and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary of Agriculture which imposed assessments on the producers to cover costs associated with the orders, including generic advertising. *See Wileman*, 521 U.S. at 460. The United States Supreme Court framed the issue before it succinctly: "whether being compelled to fund this advertising raises a First Amendment issue . . . to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Id.* at 468. In deciding upon the latter, the Supreme Court placed emphasis upon the fact that

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader

> collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469. In conjunction with the applicable statutory scheme, the Court noted three critical characteristics about the marketing orders in effect:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70. On these grounds, the Supreme Court concluded that the regulation at issue would properly be judged under the standard of review appropriate for economic regulations rather than under the heightened scrutiny applicable to First Amendment issues. *Id.* at 469-70.

Several terms later, in *United Foods*, the Supreme Court considered a challenge to the constitutionality of a statute mandating the issuance of assessments on handlers of fresh mushrooms in order to fund advertising for their products. *See United Foods*, 533 U.S. at 408. In finding that the First Amendment was violated, the Supreme Court outlined the fundamental difference between the facts before it in *United Foods* and those before it in *Wileman*:

> In [*Wileman*] the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

Id. at 411-12. More specifically, the Supreme Court observed that the rationale of the holding in *Wileman* was premised upon the fact that the nectarine and peach producers "were bound together and required by the statute to market their

products according to cooperative rules," and that "their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *Id.* at 412. In the case of mushroom handlers, on the other hand, no comparable regulatory scheme existed: there were no marketing orders in place regulating the production and sale of mushrooms, no exemption existed for mushroom producers from antitrust laws, and no encroachments existed upon the ability individual mushroom producers to make their own marketing decisions. *Id.* at 412. In fact, the only regulations affecting mushroom producers were the mandatory assessments which were instituted for the sole purpose of creating and funding generic advertising for mushrooms. *Id.* Therefore, the Court concluded that there was no support for the proposition that the compelled contributions for advertising were part of a broader regulatory scheme whereby the statute would be appropriately relegated to the standard of review applicable to economic regulations as applied in *Wileman*.[4] *Id.* at 415. Instead, the Supreme Court analyzed the assessments under the standard of review appropriate for First Amendment issues and ultimately determined that the assessments were impermissible intrusions upon the mushroom handlers' First Amendment rights. *Id.* at 416.

Based upon the aforementioned decades of regulations affecting the milk industry and milk producers in particular, we conclude that Section 4505(g) of the Stabilization Act is part of a larger regulatory scheme affecting the sale and

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[4] Quoting the Court of Appeals opinion in the case, the Supreme Court recognized that "'the mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program,' and 'the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.'" *United Foods*, 533 U.S. at 412 (quoting *United States v. United Foods, Inc.*, 197 F.3d 221, 221, 223 (6th Cir. 1991)).

production of milk.[5] On this basis, we find that milk producers are regulated to a similar degree as were the tree fruit growers in *Wileman* and that "the mandated assessments for speech [are] ancillary to a more comprehensive program restricting marketing autonomy."[6] *United Foods*, 533 U.S. at 411.

The remainder of our analysis will accordingly be devoted to whether or not the provisions of the Stabilization Act at issue in this case pass the three part test set out by the Supreme Court in *Wileman*. *See Wileman*, 521 U.S. at 469-70.

a. Whether Section 4504(g) of the Stabilization Act imposes a restraint on the freedom to communicate.

Neither Section 4504(g) of the Stabilization Act, nor any other provision within the Act that we are aware of, imposes a restraint on the Cochrans' (or any other milk producer's) freedom to communicate any message they desire to any audience whatsoever.[7]

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[5] We note, for the sake of clarity and completeness, that in making this determination we have considered the entire regulatory scheme applicable to milk producers as opposed to limiting our analysis to the Stabilization Act alone. *See Gallo Cattle Company v. California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999) (where the court considered the entire regulatory scheme affecting milk producers rather than limiting its review to the single milk marketing order being challenged in that case).

[6] We believe that there can be no dispute that milk producers are regulated to a far greater extent than were the mushroom growers in United FoodsUnited Foods.

[7] The fact that the assessments "may indirectly lead to a reduction in a [dairy producer's] individual advertising budget does not itself amount to a restriction on speech." *Wileman*, 521 U.S. at 470.

b. Whether Section 4504(g) of the Stabilization Act compels any person to engage in any actual or symbolic speech.

Section 4504(g) does not compel the Cochrans to engage in any actual or symbolic speech. The mandatory assessments charged to the Cochrans and other milk producers pursuant to the Act, although used to subsidize the generic advertising of milk, are not considered to be "compelled speech."[8] *See Gallo*, 185 F.3d at 976 (citing *Wileman*, 521 U.S. 470-72, 138 L. Ed. 2d 585, 117 S. Ct. 2130). Moreover, the generic advertisements funded by the assessments are attributed to the National Dairy Promotion Board rather than to the Cochrans or any other individual dairy producers. *See* 7 U.S.C. § 4504(c).

c. Whether Section 4504(g) of the Stabilization Act compels dairy producers to endorse or finance any political or ideological views.

Pursuant to the provisions of the Stabilization Act, the Cochrans are obligated to finance advertisements which contain messages to which they object. Specifically, the Cochrans assert that they disagree with the promotion of milk generically as "speech that denies there is any difference in milk."[9] Cochran Decl. P. 13.

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[8] This is because "the use of assessments to pay for advertising does not require [the Cochrans] to repeat an objectionable message out of their own mouths, require them to use their own property to convey and antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Wileman*, 521 U.S. 470-471, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (internal citations and quotations omitted).

[9] At oral argument, the Cochrans asserted additional, albeit somewhat imprecise, objections to the content of the advertisements: that the Cochrans prefer more traditional farming methods than those employed

For the sake of deciding upon the pending motions, we assume without holding that the Cochrans' objections are ideological in their nature.

"Assessments to fund a lawful collective program may sometimes be used to pay for [ideological] speech over the objection of some members of the group," *Wileman*, 521 U.S. at 472-3, but only if the advertising funded by those assessments is "germane to the purposes for which compelled association [is] justified." *See id.* at 473; *see also Abood v. Detroit Bd. of Education*, 431 U.S. 230, 235-36, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); *Gallo*, 185 F.3d at 976.

The Stabilization Act was conceived of as a means of creating "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products." 7 U.S.C. § 4501(b). "Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market." *Wileman*, 521 U.S. at 476. There can be no doubt if the relevant advertising is effective in that it increases the demand for milk, it will have furthered the articulated objectives of the Act. Therefore, we hold that the creation of a generic advertising campaign for milk is germane to the declared purposes of the Stabilization Act.[10]

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by the majority of milk producers and that advertisements may be deemed to promote sexually explicit messages.

[10] It is worth noting that Plaintiffs do not assert that the advertising at issue is in any way false or deceptive. In this regard, Plaintiffs' imprecise "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely." *Wileman*, 521 U.S. 474, 138 L. Ed. 2d 585, 117 S. Ct. 2130.

CONCLUSION:

It became clear to the Court at oral argument that despite Plaintiffs' efforts to frame their argument within the ambit of the United Foods and Wileman continuum of cases, in reality Plaintiffs are urging this Court to embrace and apply Justice Souter's dissenting opinion in Wileman to the case at bar.[11] To follow Justice Souter's position would necessarily entail applying a standard of review contrary to the holding of Wileman. As a district court, we are bound to apply the law of the land in a manner consistent with Supreme Court jurisprudence. We will not, therefore, disregard controlling precedent.[12]

Accordingly, we find that Section 4504(g) of the Stabilization Act is a species of economic regulation that does not infringe upon the First Amendment rights of the Cochrans. We will deny Plaintiffs' Motion for Summary Judgment and grant both the Governmental Defendants' and the Intervenors' motions for summary judgment.

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[11] Justice Souter would "adhere to the principle laid down in our compelled-speech cases: laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities. Under the test for commercial speech, the law may be held constitutional only if (1) the interest being pursued by the government is substantial, and (2) the regulation direction advances that interest and (3) is narrowly tailored to serve it." *Wileman*, 521 U.S. 491, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (SOUTER, J., dissenting).

[12] Cognizant that we may be stating the obvious, our holding should be considered apart from any perceived appraisal on our part as to the benefits or harms arising out of the imposition of a generic advertising program funded by assessments charged to milk producers pursuant to the Stabilization Act. Reasonable people can and do differ as to the virtues of such a scheme.

NOW THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Summary Judgment (doc. 2) is denied.

2. The Governmental Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (doc. 9) is granted.

3. The Intervenors' Motion for Summary Judgment (doc. 45) is granted.

4. Plaintiffs' Motion for Leave to Supplement the Record (doc. 62) is granted.

5. The Clerk is directed to close the file on the case.

John E. Jones III
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
Appellants,

v.

ANN VENEMAN, Secretary, U.S. Department of Agriculture; NATIONAL DAIRY PROMOTION BOARD, FRED LOVELL; LEE GREENWALT; JACKIE ROOT; EARNEST NORMAN; STEPHEN MASHALL; CECIL MOYER; JAMES VANBLARCOM
Intervenor/Defendants in D.C.

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 02-cv-00529)
District Jude: The Honorable John E. Jones

Submitted under Third Circuit LAR 34.1(a)
January 12, 2004

SUR PETITION FOR REHEARING
AND HEARING EN BANC

Before: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH CHERTOFF, FISHER and ALDISERT*, *Circuit Judges*

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* Judge Aldisert's vote was limited to panel rehearing only.

The Petition for Rehearing filed by Appellant filed by Appellees and the Petition for Rehearing on behalf of the Intervenors having been submitted to the judges who participate din the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT

/s/ Ruggero J. Aldisert
RUGGERO J. ALDISERT
Circuit Judge

DATED: May 3, 2004

APPENDIX D

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7 USCS § 4501 (2004)

§ 4501. Congressional findings and declaration of policy

(a) Congress finds that—

(1) dairy products are basic foods that are a valuable part of the human diet;

(2) the production of dairy products plays a significant role in the Nation's economy, the milk from which dairy products are manufactured is produced by thousands of milk producers, and dairy products are consumed by millions of people throughout the United States;

(3) dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation; and

(5) dairy products move in interstate and foreign commerce, and dairy products that do not move in such channels of commerce directly burden or affect interstate commerce of dairy products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and

expand domestic and foreign markets and uses for fluid milk and dairy products. Nothing in this subtitle [7 USCS §§ 4501 *et seq.*] may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk or the right of any person to import dairy products.

§ 4502. Definitions

As used in this subtitle [7 USCS §§ 4501 *et seq.*]—

(a) the term "Board" means the National Dairy Promotion and Research Board established under section 113 of this subtitle [7 USCS § 4504];

(b) the term "Department" means the Department of Agriculture;

(c) the term "Secretary" means the Secretary of Agriculture;

(d) the term "milk" means any class of cow's milk;

(e) the term "dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products;

(f) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(h) the term "producer" means any person engaged in the production of milk for commercial use;

(i) the term "promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products;

(j) ~~the~~ term "research" means studies testing the effectiveness of market development and promotion efforts, studies

relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products;

(k) the term "nutrition education" means those activities intended to broaden the understanding of sound nutritional principles including the role of milk and dairy products in a balanced diet;

(l) the term "United States" as used in sections 110 through 117 [7 USCS §§ 4501-4508] means the forty-eight contiguous States in the continental United States;

(m) the term "imported dairy product" means any dairy product that is imported into the United States (as defined in subsection (l)), including dairy products imported into the United States in the form of—

(1) milk, cream, and fresh and dried dairy products;

(2) butter and butterfat mixtures;

(3) cheese; and

(4) casein and mixtures;

(n) the term "importer" means a person that imports an imported dairy product into the United States; and

(o) the term "Customs" means the United States Customs Service.

§ 4503. Issuance of orders

(a) Notice and opportunity for public comment. During the period beginning with the date of enactment of this subtitle [enacted Nov. 29, 1983] and ending thirty days after receipt of a proposal for an initial dairy products promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment upon the proposed order. The proposal for an order may be submitted by an organization certified under section

114 of this subtitle [7 USCS § 4505] or by any interested person affected by the provisions of this subtitle [7 USCS §§ 4501 *et seq.*].

(b) Effective date of orders. After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a dairy products promotion and research order. Such order shall become effective not later than ninety days following publication of the proposal.

(c) Amendment of orders. The Secretary may, from time to time, amend a dairy products promotion and research order.

(d) Order implementation and international trade obligations. The Secretary, in consultation with the United States Trade Representative, shall ensure that the order is implemented in a manner consistent with the international trade obligations of the Federal Government.

§ 4504. Required terms in orders

Any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] shall contain terms and conditions as follows:

(a) The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

(b) National Dairy Promotion and Research Board.

(1) The order shall provide for the establishment and appointment by the Secretary of a National Dairy Promotion and Research Board that shall consist of not less than thirty-six members.

(2) Except as provided in paragraph (6), the members of the Board shall be milk producers appointed by the Secretary from nominations submitted by eligible organizations certified under section 114 of this subtitle [7 USCS § 4505], or, if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, any such eligible organization, then from nominations made by such milk producers in the manner authorized by the Secretary.

(3) In making such appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of milk production volume throughout the United States.

(4) In determining geographic representation, whole States shall be considered as a unit.

(5) A region may be represented by more than one director and a region may be made up of more than one State.

(6) Importers.

(A) Initial representation. In making initial appointments to the Board of importer representatives, the Secretary shall appoint 2 members who represent importers of dairy products and are subject to assessments under the order.

(B) Subsequent representation. At least once every 3 years after the initial appointment of importer representatives under subparagraph (A), the Secretary shall review the average volume of domestic production of dairy products compared to

the average volume of imports of dairy products into the United States during the previous 3 years and, on the basis of that review, shall reapportion importer representation on the Board to reflect the proportional share of the United States market by domestic production and imported dairy products.

(C) Additional members; nominations. The members appointed under this paragraph—

(i) shall be in addition to the total number of members appointed under paragraph (2); and

(ii) shall be appointed from nominations submitted by importers under such procedures as the Secretary determines to be appropriate.

(7) The term of appointment to the Board shall be for three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms.

(8) The Board shall appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced as well as importers of dairy products.

(9) The executive committee shall have such duties and powers as are conferred upon it by the Board.

(10) Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board including a per diem allowance as recommended by the Board and approved by the Secretary.

(c) The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and

evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order. The Board shall solicit, among others, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use.

(d) The order shall provide that the Board shall develop and submit to the Secretary for approval any promotion, research, or nutrition education plan or project and that any such plan or project must be approved by the Secretary before becoming effective.

(e) Budgets.

(1) Preparation and submission. The order shall require the Board to submit to the Secretary for approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of the order, including projected costs of dairy products promotion and research projects.

(2) Foreign market efforts. The order shall authorize the Board to expend in the maintenance and expansion of foreign markets an amount not to exceed the amount collected from United States producers for a fiscal year. Of those funds, for each of the 2002 through 2007 fiscal years, the Board's budget may provide for the expenditure of revenues available to the Board to

develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States.

(f) The order shall provide that the Board, with the approval of the Secretary, may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a) and for the payment of the cost thereof with funds collected through assessments under the order. Any such agreement shall provide that (1) the contracting party shall develop and submit to the Board a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project, (2) the plan or project shall become effective upon the approval of the Secretary, and (3) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Board of activities conducted, and such other reports as the Secretary or the Board may require.

(g) Assessments.

(1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.

(2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subtitle [7 USCS §§ 4501 *et seq.*].

(3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by

the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as provided by the Secretary.

(4) A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after the date of enactment of this Act [enacted Nov. 29, 1983], up to the aggregate rate in effect on the date of enactment of this Act [enacted Nov. 29, 1983] of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed.

(5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

(6) Importers.

(A) In general. The order shall provide that each importer of imported dairy products shall pay an assessment to the Board in the manner prescribed by the order.

(B) Time for payment. The assessment on imported dairy products shall be paid by the importer to Customs at the time the entry documents are filed with Customs. Customs shall remit the assessments to the Board. For purposes of this subparagraph, the term "importer" includes persons who hold title to foreign-produced dairy products immediately upon release by Customs, as well as persons who act on behalf of

others, as agents, brokers, or consignees, to secure the release of dairy products from Customs.

(C) Use of assessments on imported dairy products. Assessments collected on imported dairy products shall not be used for foreign market promotion.

(h) The order shall require the Board to (1) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe, (2) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe, and (3) account for the receipt and disbursement of all funds entrusted to it.

(i) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subtitle [7 USCS §§ 4501 *et seq.*] only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(j) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental policy or action except as provided by subsection (c)(5).

(k) The order shall require that each importer of imported dairy products, each person receiving milk from farmers for commercial use, and any person marketing milk of that person's own production directly to consumers, maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this

subtitle [7 USCS §§ 4501 *et seq.*], or any order or regulation issued under this subtitle [7 USCS §§ 4501 *et seq.*]. All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order with reference to which the information to be disclosed was obtained. Nothing in this subsection may be deemed to prohibit (1) the issuance of general statements, based upon the reports, of the number of persons subject to an order or statistical data collected therefrom, which statements do not identify the information furnished by any person, or (2) the publication, by direction of the Secretary, of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. No information obtained under the authority of this subtitle [7 USCS §§ 4501 *et seq.*] may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of this subtitle [7 USCS §§ 4501 *et seq.*] and any investigatory or enforcement action necessary for the implementation of this subtitle [7 USCS §§ 4501 *et seq.*]. Any person violating the provisions of this subsection shall, upon conviction, be subject to a fine of not more than $ 1,000, or to imprisonment for not more than one year, or both, and, if an officer or employee of the Board or the Department, shall be removed from office.

(l) The order shall provide terms and conditions, not inconsistent with the provisions of this subtitle [7 USCS §§ 4501 *et seq.*], as necessary to effectuate the provisions of the order.

§ 4505. Certification of organizations

(a) The eligibility of any organization to represent milk producers, and to participate in the making of nominations under section 113 of this subtitle [7 USCS § 4504] shall be certified by the Secretary. The Secretary shall certify any organization that the Secretary determines meets the eligibility criteria established by the Secretary under this section and the Secretary's determination as to eligibility shall be final.

(b) Certification shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary, including, but not limited to, the following:

(1) geographic territory covered by the organization's active membership;

(2) nature and size of the organization's active membership including the proportion of the total number of active milk producers represented by the organization;

(3) evidence of stability and permanency of the organization;

(4) sources from which the organization's operating funds are derived;

(5) functions of the organization; and

(6) the organization's ability and willingness to further the aims and objectives of this subtitle [7 USCS §§ 4501 *et seq.*].

The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk and whether the primary or overriding interest of the organization is in the production or processing

of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

§ 4506. Requirement of referendum

(a) Within the sixty-day period immediately preceding September 30, 1985, the Secretary shall conduct a referendum among producers who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use for the purpose of ascertaining whether the order then in effect shall be continued. Such order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum, who during a representative period (as determined by the Secretary) have been engaged in the production of milk for commercial use. If continuation of the order is not approved by a majority of the producers voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that such action is favored by a majority of the producers voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) The Secretary shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with the conduct of any referendum under this section and section 116 [7 USCS § 4507], except for the salaries of Government employees.

§ 4507. Suspension and termination of orders

(a) After September 30, 1985, the Secretary shall, whenever the Secretary finds that any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] or any provision thereof obstructs or does not tend to effectuate the declared policy of this subtitle [7 USCS §§ 4501 *et seq.*], terminate or suspend the operation of such order or such provisions thereof.

(b) After September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers and importers subject to the order, to determine whether the producers and importers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use and importers voting in the referendum (who have been engaged in the importation of dairy products during the same representative period, as determined by the Secretary) and shall terminate the order in an orderly manner as soon as practicable after such determination.

(c) The termination or suspension of any order, or any provision thereof, shall not be considered an order within the meaning of this subtitle [7 USCS §§ 4501 *et seq.*].

§ 4508. Cooperative association representation

Whenever, under the provisions of this subtitle [7 USCS §§ 4501 *et seq.*], the Secretary is required to determine the approval or disapproval of producers, the Secretary shall consider the approval or disapproval by any cooperative association of producers, engaged in a bona fide manner in marketing milk or the products thereof, as the approval or disapproval of the producers who are members of or under contract with such cooperative association of producers. If a cooperative association of producers elects to vote on behalf of its members, such cooperative association shall provide each producer, on whose behalf the cooperative association is expressing approval or disapproval, a description of the question presented in the referendum together with a statement of

the manner in which the cooperative association intends to cast its vote on behalf of the membership. Such information shall inform the producer of procedures to follow to cast an individual ballot should the producer so choose within the period of time established by the Secretary for casting ballots. Such notification shall be made at least thirty days prior to the referendum and shall include an official ballot. The ballots shall be tabulated by the Secretary and the vote of the cooperative association shall be adjusted to reflect such individual votes.

§ 4509. Petition and review

(a) Any person subject to any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had on the Secretary by delivering a copy of the complaint to the Secretary. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

§ 4510. Enforcement

(a) Restraining order; civil action; minor violation. The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made or issued under this subtitle [7 USCS §§ 4501 *et seq.*]. Any civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General minor violations of this subtitle [7 USCS §§ 4501 *et seq.*] whenever the Secretary believes that the administration and enforcement of this subtitle [7 USCS §§ 4501 *et seq.*] would be adequately served by suitable written notice or warning to any person committing such violation.

(b) Civil penalties. Any person who willfully violates any provision of any order issued by the Secretary under this subtitle [7 USCS §§ 4501 *et seq.*] shall be assessed a civil penalty by the Secretary of not more than $ 1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by the order, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(c) Availability of other remedies. The remedies provided in subsections (a) and (b) of this section shall be in addition to, and not exclusive of, other remedies that may be available.

§ 4511. Investigations; power to subpoena and take oaths and affirmations; aid of courts

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subtitle [7 USCS §§ 4501 *et seq.*] or to determine

whether any person subject to the provisions of this subtitle [7 USCS §§ 4501 *et seq.*] has engaged or is about to engage in any act that constitutes or will constitute a violation of any provision of this subtitle [7 USCS §§ 4501 *et seq.*] or of any order, or rule or regulation issued under this subtitle [7 USCS §§ 4501 *et seq.*]. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 4512. Administrative provisions

(a) Nothing in this subtitle [7 USCS §§ 4501 *et seq.*] may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this subtitle [7 USCS §§ 4501 *et seq.*] applicable to orders shall be applicable to amendments to orders.

§ 4513. Authorization of appropriations

There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subtitle [7 USCS §§ 4501 *et seq.*]. The funds so appropriated shall not be available for payment of the expenses or expenditures of the Board in administering any provisions of any order issued under the terms of this subtitle [7 USCS §§ 4501 *et seq.*]

§ 4514. Dairy reports

The Secretary of Agriculture shall submit to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry the following reports:

(1) Not later than July 1, 1984, a report on the effect of applying, nationally, standards similar to the current California standards for fluid milk products in their final consumer form, as they would relate to—

(A) consumer acceptance, overall consumer consumption trends, and total per capita consumption;

(B) nutritional augmentation, particularly for young and older Americans;

(C) implementing improved interagency enforcement of minimum standards to prevent consumer fraud and deception;

(D) multiple component pricing for producer milk;

(E) reduced Commodity Credit Corporation purchases;

(F) consistency of product quality throughout the year and between marketing regions of the United States; and

(G) consumer prices.

(2) Not later than December 31, 1984, a report on (A) recommendations for changes in the application of the parity formula to milk so as to make the formula more consistent with modern production methods and with special attention to the cost of producing milk as a result

of changes in productivity, and (B) the feasibility of imposing a limitation on the total amount of payments and other assistance a producer of milk may receive during a year under section 201(d) of the Agricultural Act of 1949 (7 U.S.C. 1446(d)) [7 USCS § 1446(d)].

(3) Not later than April 15, 1985, a report on the effectiveness of the paid diversion program carried out under section 201(d) of the Agricultural Act of 1949 [7 USCS § 1446(d)].

(4) Not later than July 1, 1985, and July 1 of each year after the date of enactment of this title [enacted Nov. 29, 1983], an annual report describing activities conducted under the dairy products promotion and research order issued under subtitle B of title I of this Act [7 USCS §§ 4501 *et seq.*], and accounting for the receipt and disbursement of all funds received by the National Dairy Promotion and Research Board under such order including an independent analysis of the effectiveness of the program.

APPENDIX E

TITLE 7—AGRICULTURE

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

PART 1150—DAIRY PROMOTION PROGRAM

SUBPART—DAIRY PROMOTION AND RESEARCH ORDER

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§ 1150.101 Act.

Act means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto.

§ 1150.102 Department.

Department means the United States Department of Agriculture.

§ 1150.103 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1150.104 Board.

Board means the National Dairy Promotion and Research Board established pursuant to § 1150.131.

§ 1150.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

§ 1150.106 United States.

United States means the 48 contiguous States in the continental United States.

§ 1150.107 Fiscal period.

Fiscal period means the calendar year or such other annual period as the Board may determine.

§ 1150.108 Eligible organization.

Eligible organization means any organization which has been certified by the Secretary pursuant to § § 1150.270 through 1150.278 of this part.

§ 1150.109 Qualified State or regional program.

Qualified State or regional program means any State or regional dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to.

§ 1150.110 Producer.

Producer means any person engaged in the production of milk for commercial use.

§ 1150.111 Milk.

Milk means any class of cow's milk produced in the United States.

§ 1150.112 Dairy products.

Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products.

§ 1150.113 Fluid milk products.

Fluid milk products means those milk products normally consumed in liquid form as a beverage.

§ 1150.114 Promotion.

Promotion means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of, and demand for, dairy products generally.

§ 1150.115 Research.

Research means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for dairy products.

§ 1150.116 Nutrition education.

Nutrition education means those activities intended to broaden the understanding of sound nutritional principles, including the role of milk and dairy products in a balanced diet.

§ 1150.117 Plans and projects.

Plans and projects means promotion, research and nutrition education plans, studies or projects pursuant to § § 1150.139, 1150.140 and 1150.161.

§ 1150.118 Marketing.

Marketing means the sale or other disposition in commerce of dairy products.

§ 1150.119 Cooperative association.

Cooperative association means any cooperative marketing association of producers which is organized under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act".

§ 1150.131 Establishment and membership.

(a) There is hereby established a National Dairy Promotion and Research Board of thirty-six members. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) Two members from region number one comprised of the following States: Washington and Oregon.

(2) Seven members from region number two comprised of the following State: California.

(3) Three members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming.

(4) Three members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Two members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri, and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) One member from region number ten comprised of the following States: Florida, Georgia, North Carolina, South Carolina and Virginia.

(11) Three members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Three members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(b) The Board shall be composed of milk producers appointed by the Secretary either from nominations submitted pursuant to § 1150.133 or in accordance with § 11150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(c) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(d) The number of members for each region which shall serve on the Board shall be determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36 which provides a factor of pounds of milk per member, and then dividing the total pounds of milk for each region by such factor.

(e) In determining the volume of milk produced in the United States, the Board and the Secretary shall utilize the information received by the Board pursuant to § 1150.171 and data published by the Department.

§ 1150.132 Term of office.

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(b) Each member of the Board shall serve until October 31 of the year in which his/her term expires, except that a retiring member may serve until a successor is appointed.

(c) No member shall serve more than two consecutive terms.

§ 1150.133 Nominations.

Nominations for members of the Board shall be made in the following manner:

(a) Upon effectuation of this provision, the Secretary shall solicit nominations for the initial Board from all eligible organizations. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

(b) After the appointment of the initial Board, the Secretary shall announce at least 120 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in paragraph (a) of this section. Nominations for such position should be submitted to the Secretary not less than 60 days prior to the expiration of such term.

(c) An eligible organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing producers in a specific region, they may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

§ 1150.134 Nominee's agreement to serve.

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

§ 1150.135 Appointment.

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1150.131(a).

§ 1150.136 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or from nominations made by the Board.

§ 1150.137 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall establish rules concerning timely notice of meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph when in the opinion of the chairman of the Board such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

§ 1150.138 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a per diem allowance as recommended by the Board and approved by the Secretary, incurred by them in the performance of their duties under this subpart.

§ 1150.139 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules and regulations to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;

(h) To recommend to the Secretary amendments to this subpart; and

(i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

§ 1150.140 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairman and such other officers as may be necessary;

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;

(d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to § 1150.153, and to recommend to the Secretary whether such request should be granted;

(e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;

(f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;

(g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities

authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(m) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

§ 1150.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. However, after the first full year of operation of the order, administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year. Such expenses shall be paid from assessments collected pursuant to § 1150.152.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1150.152, for administrative costs incurred by the Department after May 1, 1984.

§ 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to § 1150.152 (a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

(d) In order for a producer described in § 1150.152(a) to receive the credit authorized in § 1150.152(c), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified State or regional program. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(e) In order for a producer described in § 1150.152(b) to receive the credit authorized in § 1150.152(c), the producer and the applicable qualified State or regional program must establish to the Board that the producer is contributing to a qualified State or regional program.

(f) The collection of assessments pursuant to § 1150.152(a) and (b) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary. If the Board is not constituted by the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board. The Secretary shall remit such assessments to the Board when it is constituted.

(g) Each person responsible for the remittance of the assessment pursuant to § 1150.152(a) and (b) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(h) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171 shall be mailed to the location designated by the Secretary or the Board.

§ 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.

(a) Any organization which conducts a State or regional dairy product promotion, research or nutrition education program may apply to the Secretary for certification of qualification so that producers may receive credit pursuant to § 1150.152(c) for contributions to such program.

(b) In order to be certified by the Secretary as a qualified program, the program must:

(1) Conduct activities as defined in §§ 1150.114, 1150.115, and 1150.116 that are intended to increase consumption of milk and dairy products generally;

(2) Except for programs operated under the laws of the United States or any State, have been active and ongoing before enactment of the Act;

(3) Be financed primarily by producers, either individually or through cooperative associations;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers for refunds under the program will be honored by

forwarding to either the Board or a qualified State or regional program designated by the producer that portion of such refunds equal to the amount of credit that otherwise would be applicable to that program pursuant to § 1150.152(c); and

(6) Not use program funds for the purpose of influencing governmental policy or action.

(c) An application for certification of qualifications of any State or regional dairy product promotion, research or nutrition education program which does not satisfy the requirements specified in paragraph (b) of this section shall be denied. The certification of any qualified program which fails to satisfy the requirements specified in paragraph (b) of this section after certification shall be subject to suspension or termination.

(1) Prior to the denial of an application for certification of qualification, or the suspension or termination of an existing certification, the Director of the Dairy Division shall afford the applicant or the holder of an existing certification an opportunity to achieve compliance with the requirements for certification within a reasonable time, as determined by the Director.

(2) Any State or regional dairy product promotion, research or nutrition education program whose application for certification of qualification is to be denied, or whose certification of qualification is to be suspended or terminated shall be given written notice of such pending action and shall be afforded an opportunity to petition the Secretary for a review of the action. The petition shall be in writing and shall state the facts relevant to the matter for which the review is sought, and whether petitioner desires an informal hearing. If an informal hearing is not requested, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action. If petitioner requests a hearing, the Director of the Dairy Division, or a person

designated by the Director, shall hold an informal hearing in the following manner:

(i) Notice of a hearing shall be given in writing and shall be mailed to the last known address of the petitioner or of the State or regional program, or to an officer thereof, at least 20 days before the date set for the hearing. Such notice shall contain the time and place of the hearing and may contain a statement of the reason for calling the hearing and the nature of the questions upon which evidence is desired or upon which argument may be presented. The hearing place shall be as convenient to the State or regional program as can reasonably be arranged.

(ii) Hearings are not to be public and are to be attended only by representatives of the petitioner or the State or regional program and of the U.S. Government, and such other parties as either the State or regional program or the U.S. Government desires to have appear for purposes of submitting information or as counsel.

(iii) The Director of the Dairy Division, or a person designated by the Director, shall be the presiding officer at the hearing. The hearing shall be conducted in such manner as will be most conducive to the proper disposition of the matter. Written statements or briefs may be filed by the petitioner or the State or regional program, or other participating parties, within the time specified by the presiding officer.

(iv) The presiding officer shall prepare preliminary findings setting forth a recommendation as to what action should be taken and the basis for such action. A copy of such findings shall be served upon the petitioner or the State or regional program by mail or in person. Written exceptions to the findings may be filed within 10 days after service thereof.

(v) After due consideration of all the facts and the exceptions, if any, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action.

§ 1150.154 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this subpart.

§ 1150.155 Adjustment of accounts.

Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

§ 1150.156 Charges and penalties.

(a) Late-payment charge. Any unpaid assessments to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(b) Penalties. Any person who willfully violates any provision of this subpart shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by this subpart, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States. The remedies provided in this section shall be in addition to, and not exclusive of, other remedies that may be available by law or in equity.

§ 1150.161 Promotion, research and nutrition education.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any plans or projects authorized in §§ 1150.139, 1150.140 and this section. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research and nutrition education with respect to milk and dairy products; and

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing and utilization of milk and dairy products and the creation of new products thereof, to the end that marketing and utilization of milk and dairy products may be encouraged, expanded, improved or made more acceptable. Included shall be research and studies of proposals intended to increase the use of fluid milk and dairy products by the military and by persons in developing nations and proposals intended to demonstrate the feasibility of converting nonfat dry milk to casein for domestic and export use.

(b) Each plan or project authorized under § 1150.161(a) shall be periodically reviewed or evaluated by the Board to

insure that the plan or project contributes to an effective program of promotion, research and nutrition education. If it is found by the Board that any such plan or project does not further the purposes of the Act, the Board shall terminate such plan or project.

(c) No plan or project authorized under § 1150.161(a) shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

§ 1150.171 Reports.

Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under § 1150.152 shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(a) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(b) The amount of assessment remitted;

(c) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(d) The date any assessment was paid.

§ 1150.172 Books and records.

Each person who is subject to this subpart, and other persons subject to § 1150.171, shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify

any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1150.173 Confidential treatment.

All information obtained from such books, records or reports under the Act and this subpart shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

§ 1150.181 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by

the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to § 1150.140(i);

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research or nutrition education plans or projects authorized pursuant to this subpart.

§ 1150.182 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued

pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

§ 1150.183 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee, except for acts of dishonesty or willful misconduct.

§ 1150.184 Patents, copyrights, inventions and publications.

Any patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, § 1150.181 shall apply to determine disposition of all such property.

§ 1150.185 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose such amendments to the Secretary.

§ 1150.186 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, 1150.202, 1150.204, 1150.205, 1150.211 and 1150.273 of these regulations (7 CFR Part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0147.

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 14, 2002]

No. 3:02cv00529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN M. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

Pursuant to LR 56.1, defendants hereby state that there is no genuine issue to be tried as to the following material facts:

1. The economics of the dairy industry are governed by two "distinctive and essential phenomena." *Zuber v. Allen*, 396 U.S. 168, 172 (1969).

2. Milk can be used as "a fluid staple of daily consumer diet" or as "an ingredient in manufactured dairy products such as butter and cheese." *Id.*

3. "Milk used in the consumer market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture." *Id.*

4. Dairy cows are more productive in the summer than in the winter. *Id.* at 172-73.

5. Because the demand for fluid milk is relatively constant throughout the year, milk producers must maintain herds that are sufficiently large to "supply winter needs;" their doing so results in "oversupply in the more fruitful months." *Id.* at 173.

6. Over the years, the above phenomena have led to "disorderly marketing conditions and depressed prices." *Smyser v. Block*, 760 F.2d 5 14, 5 15 (3d Cir. 1985).

7. To "restore order to the market and boost the purchasing power of farmers," Congress has taken repeated action. *See, eg., Zuber*, 396 U.S. at 174-76.

8. In 1949, Congress created a federal price support program for milk. Agricultural Act of 1949, ch. 792, § 201, 63 Stat. 1052.

9. The creation of the price support program arose from concern that the "extraordinary demands for American agricultural production during the war period ha[d] largely ceased to exist." *See* S. Rep. No. 8 1-1091 at 1, *reprinted in* 1949 U.S.C.C.A.N. 2407, 2408.

10. In creating the price support program for milk, Con gress authorized the Secretary of Agriculture (the "Secretary") to purchase butter, natural cheddar cheese, and nonfat dry milk at announced prices through the Commodity Credit Corporation, a federal corporation within the Department of Agriculture. S. Rep. No. 98-163 at 12-13, *reprinted in* 1983 U.S.C.C.A.N. 1658, 1669-70; *see* 15 U.S.C. § 714.

11. The purpose of the purchases was to "explicitly put[] a floor under the price of manufacturing grade milk and thus maintain[] a floor under all milk prices." S. Rep. No. 98-163 at 13.

12. By 1983, the price support program for milk had succeeded in "fulfill[ing] its goal of providing adequate supplies of wholesome and nutritious fluid milk and dairy products at reasonable prices to the consumer and at minimum cost to the taxpayer." *Id.*

13. However, "recent years ha[d] seen milk production far outpace demand, leaving the Government to purchase unacceptable and increasing amounts of surplus dairy products."

Id.

14. Efforts on the part of the dairy industry to solve the problem had been limited and unsuccessful. *See id.* at 14-15.

15. To "further stimulate demand for fluid milk and dairy products," and thus to reduce the amount of milk, butter and cheese that the government would have to buy, Congress created the Dairy Promotion Program in 1983. Dairy Production Stabilization Act of 1983, Pub. L. No. 98- 180, tit. I, subtit. B, 97 Stat. 1136 (the "Stabilization Act") (codified as amended at 7 U.S.C. §§ 4501-4514); *see* S. Rep. No. 98-163 at 18, 19.

16. The idea for the Dairy Promotion Program came from producer groups. *See* S. Rep. No. 98-163 at 18.

17. In creating the Dairy Promotion Program, Congress found that "dairy products are a valuable part of the human diet;" that "the production of dairy products plays a significant role in the Nation's economy;" that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;" and that the maintenance and expansion of existing markers for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation." 7 U.S.C. § 4501(a)(l)-(4).

18. Based on these findings, Congress declared it to be "in the public interest" for the Nation to have "an orderly procedure for financing (through assessments on all milk produced in the United States) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." Stabilization Act § 110(b) (codified as amended at 7 U.S.C. § 4501(b)).

19. The Dairy Promotion Program was, and is, one of a series of "federally-authorized checkoff programs" that Congress has created for various agricultural commodities. *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1999S(a)(l), 104 Stat. 3927.

20. In 1990, Congress found that the checkoff programs had "substantially contributed to strengthening markets for the agricultural products covered by the programs." *Id.* § 1999S(a)(3).

21. Reiterating its support for the checkoff programs, Congress found in 1996 that "[g]eneric promotion, research, and information activities for agricultural commodities play a unique role in advancing the demand for such commodities, since such activities increase the total market for a product to the benefit of consumers and all producers." Commodity Promotion, Research, and Information Act of 1996, Pub. L. No. 104-127, tit.V, subtit. B, § 512(a)(4), 110 Stat. 1032.

22. Originally, the scope of the Dairy Promotion Program was limited to producers of milk. *See* Stabilization Act § 113(g).

23. By amendments to the Stabilization Act approved in May 2002 (the "2002 Amendments"), Congress expanded the scope of the Dairy Promotion Program to include importers of dairy products. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1508, 116 Stat. __.

24. In 1996, Congress approved legislation that would have terminated the price support program for milk effective December 3 1, 1999. Agricultural Market Transition Act, Publ. L. No. 104-127, tit. I, § 141(h), 110 Stat. 915 (1996).

25. Subsequent enactments have extended the termination date for the price support program each time it has approached. *See* notes to 7 U.S.C.A. § 7251 (Supp. 2001).

26. Most recently, the termination date for the price support program has been extended through December 31, 2007. Pub. L. No. 107- 171, § 1501(a).

27. The Stabilization Act prescribes the terms and conditions that govern the Dairy Promotion Program, *see* 7 U.S.C. § 4504, but requires the terms and conditions to be incorporated into a "dairy products promotion and research order" to be issued by the Secretary. *See id.* § 4503(a).

28. Such an order (the "Dairy Order") was issued in March 1984. 49 Fed. Reg. 11806-1.

29. As required by the Stabilization Act, *see* 7 U.S.C. § 4504(b)(l), the Dairy Order establishes the National Dairy Promotion and Research Board (the "Dairy Board"). 7 C.F.R. § 1150.131(a).

30. Pending implementation of the 2002 Amendments, the Dairy Board consists of 36 milk producers, each appointed by the Secretary. *Id.* §§ 1150.131(a), 1150.135; *see* 7 U.S.C. § 4504(b)(2).

31. In addition to appointing the membership of the Dairy Board, the Secretary fills vacancies on the board "occasioned by the death, removal, resignation, or disqualification of any member." 7 C.F.R. § 1150.136.

32. The 2002 Amendments require the membership of the Dairy Board to be expanded to include representatives of persons who import dairy products. Pub. L. No. 107-171, 1505(b)(4) (adding 7 U.S.C. § 4504(b)(6)).

33. The Secretary will appoint these representatives "from nominations submitted by importers under such procedures as the Secretary determines to be appropriate." 7 U.S.C. § 4504(b)(6)(C)(ii).

34. As is further required by the Stabilization Act, *see* 7 U.S.C. § 4504(g)(1), (3), each producer of milk in the 48 contiguous states is required to pay an assessment of 15 cents

to the Dairy Board for each hundredweight of milk marketed commercially. 7 C.F.R. § 1150.152(a), (b).

35. A producer who contributes to a "State or regional dairy promotion, research, or nutrition education program" certified by the Secretary as a "Qualified Program" is entitled to a credit of up to 10 cents per hundredweight against the amount that he or she would otherwise owe to the Dairy Board. *Id.* §§ 1150.152(c), 1150.153(a).

36. Under the 2002 Amendments, importers of dairy products are also required to pay an assessment to the Dairy Board. Pub. L. No. 107-171, § 1505(d).

37. The Dairy Board possesses certain enumerated powers. 7 U.S.C. § 4504(c); 7 C.F.R. § 1150.139.

38. These powers include the authority to "administer the provisions of [the Dairy Order] in accordance with its terms and conditions." 7 C.F.R. § 1150.139(b); *see* 7 U.S.C. § 4504(c)(2).

39. The powers of the Dairy Board also include the authority to "receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals." 7 U.S.C. § 4504(c)(1); *see* 7 C.F.R. § 1150.139(a).

40. Any "promotion, research, or nutrition plan or project" that the Dairy Board develops must be "approved by the Secretary before becoming effective." 7 U.S.C. § 4504(d); *see* 7 C.F.R. § 1150.140(e).

41. The approval of the Secretary also is required for the budget of the Dairy Board and for any contract or agreement through which the board seeks to develop or implement any of its plans or projects. 7 U.S.C. § 4504(e)(I), (f); *see* 7 C.F.R. § 1150.140(g), (i).

42. With the approval of the Secretary, the Dairy Board may use "funds collected through assessments under the [Dairy Order]" to do its work. *See* 7 U.S.C. 5 4504(f); 7 C.F.R. § 1150.140(i).

43. However, such funds may not be used "for the purpose of influencing governmental policy or action," except for making recommendations to the Secretary concerning the amendment of the Dairy Order. 7 U.S.C. § 4504(j); *see* 7 C.F.R. § 1150.154.

44. The Dairy Board may purchase or develop advertising to promote the sale and consumption of dairy products. *See* 7 U.S.C. § 4504(a).

45. However, no such advertising may make use of "unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product." *Id.*

46. All advertising of the Dairy Board must be approved by the Agricultural Marketing Service ("AMS"), the component of the Department of Agriculture through which the Secretary oversees the activities of the board. Ex. A at 1 & ¶ VII(B).[1]

47. The Secretary must be notified of "meetings of the Board, committees of the Board and advisory committees, in order that the Secretary, or a representative of the Secretary, may attend." 7 C.F.R. § 1150.140(1).

48. The Office of General Counsel ("OGC") of the Department of Agriculture provides "all legal counsel" to the Dairy Board, except as OGC and AMS may otherwise agree. Ex. A ¶ VIII(A).

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[1] References to exhibits are to the exhibits to the brief in support of defendants' motion to dismiss or, in the alternative, for summary judgment.

49. During the 60-day period immediately preceding September 30, 1985, the Secretary was required to hold a referendum of milk producers to determine whether a majority favored continuation of the Dairy Promotion Program. 7 U.S.C. § 4506(a).

50. If a majority did not favor continuation, the Secretary was required to terminate the program. *Id.*

51. Since September 30, 1985, the Secretary has been authorized to conduct additional referenda at any time, and required to do so upon request of a "representative group" consisting of at least 10% of those covered by the Dairy Order. *Id.* § 4507(b).

52. The Diary Promotion Program must be terminated if a majority of those voting in a referendum under § 4507(b) do not support its continuation. *Id.*

53. The Attorney General is authorized to bring suit to enforce any order or regulation made or issued under the Dairy Promotion Program. *Id.* § 4510(a).

54. A civil penalty may be assessed against any person who "willfully violates" any such order. *Id.* §4510(b).

55. The amount of any such penalty "accrue[s] to the United States and may be recovered in a civil suit brought by the United States." *Id.*

56. The price support system for milk is one of a group of "clearly interrelated Federal programs" designed to "deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." S. Rep. No. 98-163 at 13.

57. Under the Capper-Volstead Act, ch. 57,42 Stat. 388 (1922), producers of agricultural products, including "dairymen," are permitted to join together into cooperatives to "process, prepare, and market [their] products without fear of

prosecution under the antitrust laws." *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *see* 7 U.S.C. § 291.

58. Cooperatives established under the Capper-Volstead Act may fix the prices at which their members' products may be sold, but "may not use their market power to raise prices excessively." S. Rep. No. 98- 163 at 13; *see Dairymen*, 660 F.2d at 194.

59. Under the Agricultural Marketing Agreement Act of 1937, ch. 296,50 Stat. 246, the Secretary issues orders ("marketing orders") that regulate the "handling" of milk and of certain other agricultural commodities and products by processors, associations of producers, and other such "handlers." 7 U.S.C. § 608C(1), (2).

60. With certain exceptions, marketing orders "must be approved by either two thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457,461-62 (1997) (citing 7 U.S.C. § 608c(9)(B)).

61. Because marketing orders "displace[] competition" in the markets to which they apply, they are "expressly exempted from the antitrust laws." *Glickman*, 521 U.S. at 461 (citing 7 U.S.C. § 608b).

62. Marketing orders for milk "classify milk according to its ultimate use" and, subject to certain adjustments, "fix uniform minimum prices" that handlers must pay for each of the classes. *Smyser*, 760 F.2d at 516.

63. The effect of the marketing orders for milk is to "establish[] minimum prices for fluid grade milk in most parts of the country." S. Rep. No. 98-163 at 13.

64. Under ch. 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, the importation of milk, cheese, and other dairy products is restricted by a system of

import controls, i.e., tariffs and quotas. *See. e.g.*, 7 C.F.R. pt. 6, "Subpart—Dairy Tariff-Rate Import Quota Licensing," apps. 1-3 (listing the quotas).

65. These import controls are enforced, in part, through a system of licensing administered by the Department of Agriculture. *See* 7 C.F.R. § 6.20(b).

66. The purpose of the import controls is to "protect the price support system and keep the U.S. Government from supporting world milk prices." S. Rep. No. 98-163 at 13.

67. Under the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. __, the Secretary is authorized to make cash payments to participating dairy producers for months through September 2005 in which milk prices fall below a certain level. Pub. L. No. 107-171, § 1502; *see* H. Conf. Rep. No. 107-424, Joint Explanatory Statement of the Committee of Conference, tit. I, § 36.

68. These payments are intended to compensate dairy producers for market losses caused by low prices. *See* Pub. L. No. 107-171, caption to § 1502.

69. The United Dairy Industry Association ("UDIA") is a federation of Qualified Programs. Ex. B at 9.

70. In 1994, the Dairy Board joined with UDIA to create Dairy Management Inc. ("DMI"), a District of Columbia corporation. Ex. C ¶ 1.

71. Through DMI, the Dairy Board and UDIA have merged their separate staffs to form "a single staff that serves both organizations." Ex. D.

72. The merger of the staffs has permitted the Dairy Board and UDIA to develop and implement their marketing plans and programs on a joint basis since January 1, 1995. Ex. B at 9.

73. The board that controls DMI consists of the membership of the Dairy Board plus the membership of the UDIA board. *Id.*

74. The budget and annual plan of DMI cannot be implemented without the approval of the Dairy Board. *Id.*

75. DMI conducts an extensive program of generic advertising on behalf of fluid milk. *See id.* at 20-23.

76. In doing so, DMI works with the National Fluid Milk Processor Promotion Board, the body that administers the Processor-Funded Fluid Milk Program, 7 U.S.C. §§ 6401-6417, a checkoff program separate from the Dairy Promotion Program. *Id.* at 20.

77. In 2000, the advertising for which DMI was responsible included "a full year of fluid milk print advertising through the Milk Mustache/got milk?® campaign." *Id.* at 21.

78. In addition to conducting an extensive program of generic advertising on behalf of milk, DMI conducts another such program on behalf of cheese. *Id.* at 10.

79. Other activities of DMI include the funding of scientific and technical research supportive of its marketing efforts. *Id.* at 9.

80. In 2000, DMI conducted this research through six Dairy Foods Research Centers, two Nutrition and Health Research Institutes, and 72 competitively-bid research contracts. *Id.* at 9, 89-95.

81. All advertising that DMI creates or wishes to use requires the advance approval of Dairy Programs, a component of AMS, before the advertising may be disseminated to the public. Mengel Decl. ¶ 2.

82. The normal practice of Dairy Programs is to "attend meetings, participate in conference calls, and review materials to address any concerns that [Dairy Programs] may have

with DMI staff members in the developmental stage of advertisements. *Id.*

83. On a consistent basis, DMI has altered its advertising to meet Dairy Programs' concerns. *Id.*

84. No advertising to which Dairy Programs has objected has ever been used by DMI until the concerns of Dairy Programs have been addressed. *Id.*

85. In 1998, a new televison commercial, entitled "Paws," was developed by the California Fluid Milk Processor Advisory Board ("CFMPAB") for use in the "got milk?" campaign. Ex. E at 1.

86. Intended to be humorous, the commercial featured a "milk-deprived grandmother" forced to give her cat non-dairy creamer when she found that she had run out of milk. *Id.* at 2; Ex. F.

87. At the time the commercial was produced, CFMPAB did not submit its advertising to Dairy Programs for pre-production review. *See* Ex. E at 3.

88. Wishing to broadcasting the commercial, DMI sought the approval of Dairy Programs. *See* Ex. G.

89. Approval was denied. *Id.*

90. In the judgment of Dairy Programs, the commercial portrayed non-dairy creamer as "an inferior product when substituted for milk" and was "potentially disparaging" to soybeans, an ingredient often used in the production of non-dairy creamer. *Id.*

91. Based on these findings, Dairy Programs declared the commercial to be "not appropriate for use in light of Departmental regulations and guidelines" and prohibited the use of any assessment funds from the Dairy Promotion Program "concerning this ad." *Id.*

92. Seeking reversal of this decision, CFMPAB and DMI submitted letters to Dairy Programs in which they sought to respond to the concerns that Dairy Programs had raised. Ex. E at 2-4; Ex. F.

93. In addition, CFMPAB and DMI obtained the support of the chief executive officer of the United Soybean Board, who submitted a letter in which he said that he "did not find [the commercial] in any way disparaging to soybeans or the soybean industry." Ex. H.

94. To prevent recurrence of the problem, CFMPAB agreed to submit, "through DMI, storyboards of all future commercials available for licensing," so that Dairy Programs could provide its input "*before* production dollars are invested and while adjustments can still be made." Ex. E at 3 (emphasis in the original).

95. After consideration of these materials and consultation with officials in AMS, including the Administrator's office and other commodity promotion groups, Dairy Programs changed its position. Mengel Decl. ¶ 3.

96. DMI was permitted to proceed with the airing of the commercial "with the stipulation that if opposition was raised, the commercial would be removed from television." *Id.*

97. At the time that the Dairy Order was issued, nearly 20 billion pounds of dairy surplus existed. *See* Ex. I at 2.

98. Storage of the surplus required the government to maintain warehouses containing millions of pounds of surplus products. *See. e.g., United States v. Crown Equip. Corp.*, 86 F.3d 700, 701-02 (7th Cir. 1996) (involving such a warehouse).

99. "Today, even though milk production continues to rise, there is little surplus." Ex. I at 2.

100. In 1980, the average person consumed 523 pounds of milk on a total solids basis. *Id.*

101. In 2000, the average person consumed more than 584 pounds, an increase of more than 11%. *See id.*

102. In 1997, the Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83% of all of the milk sold in the United States to plants and dealers. Ex. J, abstract.

103. Approximately 75% of "all the milk marketed in the U.S." is processed by handlers regulated under federal milk marketing orders. Ex. K at 2.

104. The 11 federal marketing orders for milk cover most of the contiguous 48 states. *See* Ex. L at 1.

105. In 1985, the Secretary conducted a referendum under 7 U.S.C. § 4506(a) to determine whether the Dairy Promotion Program should be continued. Ex. M.

106. Continuation of the program was favored by 89.7% of the dairy farmers who voted in the referendum. *Id.*

107. In 1993, the Secretary conducted another referendum to determine whether the Dairy Promotion Program should be continued. Ex. N; see 7 U.S.C. § 4507(b).

108. The referendum was held "after [the Department of Agriculture] received petitions with over 16,000 signatures requesting [such] a referendum." Ex. N.

109. Of those who voted in the referendum, 71.4% favored continuation of the program. *Id.*

Dated: June 13, 2002

Respectfully submitted,

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APPENDIX G

[Logo] Dairy Programs

Milk Marketing Order Statistics
Quantities and Utilization of Regulated Milk -Description

Each month, fluid milk processors (handlers) who are regulated under the Federal milk order (FMO) program are required to file a report of milk receipts and utilization (R & U Report) with the order's market administrator (MA). The R & U Report shows, for the month, the quantities of milk and milk products received by the handler and how this milk was used in the handler's plant. The R & U Report is used by the MA to determine the pool obligations of the handler. The MA also uses the report to generate summary market statistics for the order, which are filed with the Market Information Branch (MIB) in Dairy Programs. The MIB compiles a summary report of the individual order statistics and disseminates this information.

The market statistics presented in this section are: the number of producers (dairy farmers) whose raw milk is delivered to regulated handlers; the amount, measured in pounds, of raw milk received by regulated handlers from producers; the component (butterfat, nonfat solids, protein (true), and other solids) tests of this raw producer milk; and, the somatic cell count (a measure of milk quality) of this raw producer milk. Other market statistics include the regulated handlers' utilization, again measured in pounds, of this raw producer milk in the four classes of milk use established under the order. These classes are: I, fluid milk products (products intended to be used as a beverage); II, principally cream products, cottage cheese, ice cream and related products, and other food uses; III, hard and spreadable cheeses; and IV, butter and dried milk products.

Following is a brief description of some terms used in FMO statistics. For a detailed description of these and other terms, see the specific FMO provisions in the Code of Federal Regulations.

Marketing Area.

A marketing area is an area designated in a Federal milk order's provisions within which the handling of milk is regulated by the order. Generally, the size of the marketing area is determined by the sales territory of competing handlers. The recent consolidation of orders also looked at overlapping areas of milk supply, the number of handlers within the area, natural boundaries, cooperative association service areas, common regulatory provisions, and milk utilization in common dairy products.

Producer.

A producer is usually any dairy farmer who sells milk to a pool handler. Producers must produce milk in compliance with Grade A inspection requirements, and their milk must be either received at a pool plant or diverted to a nonpool plant for the account of a pool handler. Producer-handlers are not producers.

Handler.

A handler is a person—an individual, partnership, corporation, association, or other business unit, that is subject to the provisions of an order. A handler can be an operator of a plant that is approved by a duly constituted regulatory agency for the handling of Grade A milk. A handler also can be a milk distributor or a broker. A cooperative association that does not operate a plant can be a handler.

Pool Handler.

A pool handler is a handler that is subject in full to the provisions of the order. A pool handler can be an operator of a plant that meets the minimum performance standards

included in each order, a pool plant. Such plants include distributing plants, plants primarily engaged in processing packaged fluid milk products, and supply plants, plants primarily engaged in producing manufactured dairy products. A cooperative association that does not operate a plant can be a pool handler. A milk distributor or broker cannot be a pool handler.

Receipts of Milk.

FMO statistics include volumes of milk received by handlers regulated under each of the Federal orders. Receipts of milk principally come from producers. The volume of milk that is reported as received by handlers from producers includes all such milk regardless of where it may be sold. Milk identified as that received from producers for a given market may come directly from nearby producers or from producers associated with a supply plant which, although located several hundred miles from the marketing area, is pooled on the market. Producer milk also may include milk that is diverted by a pool plant operator to another pool plant or to a nonpool plant.

Handlers regulated under Federal milk orders process about 75 percent of all the milk marketed in the U.S. Given this, and the claim that FMO market statistics are both comprehensive and accurate, one common use of these monthly statistics is to gauge milk marketing trends in the U.S. by making year-to-year comparisons of specific statistics. The following should be kept in mind in making these comparisons. First, the reform and consolidation of Federal milk orders that occurred on January 1, 2000, resulted in significant changes to the marketing areas of some orders, and thus the handlers regulated by the new order. In some cases, previously unregulated area and thus unregulated handlers were added to an order's purview. Second, in some months, significant amounts of milk, normally associated with some orders, may not be pooled due to disadvantageous class and uniform price relationships. This has not occurred to

as large an extent in recent years. Third, since Federal milk order reform, large volumes of milk have shifted regulation among some orders and large volumes of previously unregulated milk from California have been associated with Federal milk orders. Finally, there were some changes in the classification of milk products that also were included in January 1, 2000, reform and consolidation noted above. While some FMO statistics for some markets remain comparable, one should keep in mind the issues discussed here in assessing the comparability of many FMO statistics.

Go to: *Dairy Programs*

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 24, 2002]

No. 3:02cvO0529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN M. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

SECOND DECLARATION
OF JOHN R. MENGEL

JOHN R. MENGEL says:

1. I am the Chief Economist for Dairy Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture. I have been employed in Dairy Programs in my current position since 1997. Dairy Programs of AMS is headed by a Deputy Administrator. In the absence of the Deputy Administrator, I act in that position. As Chief Economist, I am responsible for all economic analysis of the Federal Milk Marketing Order Program, and oversee Dairy Market News, Federal Milk Marketing data collection and dissemination, and AMS' oversight of the two national dairy research and promotion programs. The National Dairy Promotion and Research Program is the program being challenged in this case.

2. The federal milk marketing orders are complemented by a number of state marketing orders. Like the federal milk marketing orders, most state marketing orders classify milk

according to its ultimate use and, subject to certain adjustments, fix minimum prices that handlers must pay for each of the classes. State marketing orders exist for many of the regions (e.g., California, Maine, Montana, and parts of New York, Pennsylvania, Virginia, and Nevada) that are not covered by federal marketing orders. In total, more than 96 percent of the fluid eligible milk produced in the United States is priced under a state or federal marketing order.

3. Plaintiffs live in an area not covered by a federal milk marketing order, but choose to sell their milk under a federal order. Many other milk producers who live in areas not covered by federal milk marketing orders do the same thing.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 2002.

/s/ John R. Mengel
JOHN R. MENGEL

APPENDIX I

GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS

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United States Department of Agriculture
Agricultural Marketing Service

GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS

Congress has delegated to USDA the responsibility for implementation and oversight of commodity promotion, research, and consumer information programs established under freestanding legislation. The funding for such programs is industry specific, usually through deductions from sales by producers, marketers, and/or importers, and the programs are directed by industry boards[1]. However, the federal legislation which provides the authority for the collection and expenditure of funds also mandates for most of the programs that

[1] References to boards also include councils.

the Secretary of Agriculture appoint the Board members and approve the boards' budgets, plans, projects, and contracts. The latter responsibility has been delegated to AMS.

It is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements. It is appropriate, however, to provide guidance to boards on allocation of funds among programs commensurate with legislative authority. For example, it is AMS policy to support market-oriented research, nutrition research and education, foodservice promotion, and other programs which enhance the marketability of products.

These guidelines are designed to facilitate the application of legislative and regulatory provisions of the acts and orders[2] and to promote uniformity in the Agency's oversight of all commodity promotion and research programs. These guidelines shall be reviewed annually and amended as necessary.

I. *Budget Approval.*

A. USDA will approve all budgets. When submitting budgets to AMS, the boards must include detailed information regarding administrative expenses and written justifications for contract costs. Budget submissions must include, at a minimum, the following components:

1. A statement of objectives and strategy in each major program area (research, advertising, etc.), including reasons for significant changes from the preceding budget period.

---

[2] References to orders also include plans.

2. A summary of anticipated revenue (assessments, interest, donations, etc.) and anticipated refunds, where applicable, with comparative data for at least one preceding year.

3. A summary of proposed expenditures by major program areas, specifying those on a contractual basis, with comparative data for at least one preceding year.

4. Staff and administrative expense breakdown, with comparative data for at least one preceding year.

B. AMS also will approve amendments or additions to approved budgets, including shifting of program funds from one major area to another. Shifts that are consistent with governing bylaws need not have prior approval by AMS.

II. *Contracts.*

A. Contract Approval. AMS will approve written contracts for the development and carrying out of programs or projects of research, development, advertising, promotion, or education and written contracts for legal assistance and other consultants. The contracts will be reviewed for conformance with the provisions required by AMS and the Department—which include language regarding the prohibition on lobbying. Contracts should be approved prior to the start of activities to be carried out under the contract. AMS will require boards to formally notify potential contractors that any work they undertake prior to contract approval by USDA is at their own risk as boards are not financially liable if the contract is not approved by USDA.

B. Contract Compliance. AMS will require boards to monitor contracts for compliance with all provisions, Further, AMS will require boards to ensure that all payments to contractors are allowable and appropriate under the terms of the contract.

III. *Accountability for Financial and Program Progess.*

A. AMS will review financial statements for each accounting period for proper accountability of funds collected and expended. The financial statements should consist of (1) a balance sheet, and (2) an expense budget comparison showing expenditures during the reporting period, year-to-date expenditures, and an unexpended budget.

B. Where refunds are applicable, the financial statement should also include a monthly collection and refund report showing (1) year-to-date collection of assessments, number of requests for refunds, and total assessments refunded, and (2) comparative data for the preceding year, if applicable.

C. AMS will receive copies of annual progress reports on program activities and expenditures.

IV. *Refunds*. (where applicable)

In addition to the refund requirements in the enabling legislation, it is AMS policy that:

A. Boards disseminate procedures for receiving refunds to persons paying assessments.

B. No pressure of any kind to discourage refunds is brought by boards or staff against those seeking refunds.

C. Names of individuals obtaining refunds be kept confidential and made available only to appropriate staff personnel.

D. Refund information released be limited to dollar amount and number of refunders by State, region, or nationwide; however, no information may be released that would in any way readily identify individual persons or firms.

V. *Influencing Legislation and/or Government Policy.*

In the process of monitoring board activities, it is important for AMS to be aware of any actions which may be in conflict with the legislative prohibitions regarding influencing legislative and/or government policy. This prohibition on the use of checkoff funds applies equally to any trade/producer organizations funded wholly or in part by a particular board or contractors to the boards. However, this does not affect a trade/producer organization's ability to lobby with noncheckoff funds. Likewise, there are no restrictions on individual board members, except when acting in an official capacity for the board. The following definitions serve as a guide for commodity divisions.

A. "Influencing of legislation" is defined as:

1. Any attempt to influence any legislation or any attempt to affect the opinions of the general public or any segment thereof concerning legislation; or

2. Any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official who may participate in the formulation of legislation.

B. "Influencing of governmental policy or action" is defined as any action the principal purpose of which is to bring about a change in existing policy or regulation or affect the outcome of proposed policy or regulation, except those actions which are specifically provided for in the act, order, and/or rules and regulations.

C. These prohibitions do not preclude commodity boards from providing factual information to government officials, provided the information is presented in an unbiased manner and does not state a specific course of action.

VI. *Referendum Activities*

Boards and board members when they are acting in their official capacities are prohibited from attempting to influence voters' views, and no board funds may be expended for that purpose. Boards and board members may publicize referenda and the votable issues, explain their programs, and encourage those covered by the programs to vote.

VII. *Policy on Review and Approval of Promotional and Educational Materials.*

A. AMS will review all plans and projects of commodity boards approving those which are in compliance with the applicable legislative authority.

B. AMS will review (1) all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials—as presented at board meetings or as submitted to AMS and (2) the advertisements or printed materials generated in the campaign.

C. AMS review of nutritional claims will include verification of the supporting data to determine compliance with USDA Agricultural Handbook 8-1, the Dietary Guidelines for Americans, and other pertinent federal regulations where others exists. Any other supporting data must be substantiated by the boards.

D. AMS will disapprove any advertising which it considers to be disparaging to another commodity or in violation of the prohibition against false and misleading advertising contained in the legislation. The commodity divisions will refer any questionable advertisements to the AMS Research and Promotion Functional Committee for review and for their recommendation.

VIII. *Administration.*

A. *Legal Counsel.* USDA's Office of General Counsel (OGC) will provide all legal counsel to the boards, except as may be provided for under a Memorandum of Understanding between the individual boards, AMS, and OGC.

B. *Investments of Funds.* Commodity divisions shall require the boards to follow the AMS investment policy (Appendix 1) to ensure proper investment of board funds.

C. *Audits.* AMS will review annual financial audits performed by certified public accountants to assure that they include statements regarding whether or not (1) funds were used for lobbying, (2) the AMS investment policy was adhered to, (3) internal controls over funds met accounting standards, and (4) funds were used only for projects and other expenses authorized in a budget approved by USDA. All audits of the research and promotion boards must be performed in accordance with either standards issued by the American Institute of Certified Public Accountants or by the General Accounting Office. AMS will require boards to ensure that audits are conducted in accordance with any specific guidelines which may be developed by OIG or others and approved by AMS for use in board audits. AMS will request audit coverage to be extended to include additional activities as needed.

D. *Administrative Reviews.* AMS will conduct periodic administrative reviews of national research and promotion board operations to ensure that adequate records are maintained. Selected areas for examination will include, but not be limited to, travel expenses of board members and staff, contract compliance, and investment of funds.

E. *Bylaws and Policy Statements.* AMS will approve the bylaws and policy statements, and amendments thereto, developed by boards to ensure adequate coverage of

responsibilities, meeting procedures, and travel and related expenses.

F. *Meetings*. AMS will require notification from the boards of all board and committee meetings as well as conference calls. AMS will attend all board meetings and participate in conference calls and committee meetings when deemed necessary by the division.

G. *Board Administrative Expenses*.

1. Recognizing inherent differences in implementing laws or regulations, scope, and funding among commodity promotion and research programs, the Agency expects each board and State association or other organization, authorized by law to receive assessment funding, to establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs mandated by law. Each board shall include its annual administrative expenses as a separate item in its annual report. Each State association or other organization may be required to report its annual administrative expenses in a similar manner.

2. The Secretary's costs for oversight of the research and promotion boards described in VII(H) should not be considered as an administrative expense of the boards as these charges are outside the commodity boards' control and management.

3. Board members are not allowed a fee or compensation for board service or expenses for spouses or other family members. Also, board staff is prohibited from claiming any expenses for spouses or other family members.

4. Boards are prohibited from using assessment funds for open bars.

H. *Compliance*. The respective boards are responsible for promptly identifying violations and violators and for securing

compliance with rules and regulations wherever possible. Such procedures shall include a timetable for the referral of compliance cases to AMS for appropriate action. Upon receipt of compliance cases, AMS will:

1. Send a certified letter requesting compliance within a specified period;

2. Advise that collection will be made by administrative offset, if applicable; and

3. Refer violations to the OGC for action.

I. *Charging Research and Promotion Boards.* The research and promotion authorizing legislation requires the various boards to reimburse AMS for its costs in overseeing their programs. It is the policy of AMS that all the research and promotion programs be charged in a fair and equitable manner and that all costs be covered. In this regard, the following costs will be billed to boards:

1. *Direct Program Costs.* These costs include salaries and benefits of employees directly involved in the daily workload associated with research and promotion boards. Other costs would be travel to board meetings, rent for office space for the employees directly working on the research and promotion programs, printing of any documents, supplies, equipment, and anything else needed to complete the necessary work involved in overseeing the programs. All direct program costs should be charged to the appropriate research and promotion programs.

2. *Division Overhead.* The costs incurred by the division director's office or other involved division offices in research and promotion oversight should be charged back to the promotion boards. These costs should be distributed based on the direct program cost. In order to ensure that these costs are readily available for billing,

the distributive subcenters (directors' and administrative offices) should include a percentage charge to research and promotion programs.

As an option, depending on the organization levels—i.e., division, branch, section—involved in supervision of the promotion and research program and the amount of oversight provided, division and branch charges may be included in direct costs.

3. *Agency Overhead.* Agency management costs are spread equally to all programs based on their relative availability and/or reimbursements (currently about 7 percent of availability). Therefore, the costs of agency overhead also should be charged back to the boards.

4. *Other Costs.* The costs billed to AMS by departmental offices for authorized services provided in the support of the various boards should be charged back to the Boards. These include all billed costs to AMS by other agencies of USDA and outside government agencies. Also, costs billed to AMS by States for actual unemployment claims paid to former board employees will be charged back to the boards when the bills are received by AMS.

J. *Nominations for Board Membership.* AMS commodity divisions will establish procedures for nominating members and alternates (if applicable) to the respective boards. It is USDA policy that membership on USDA boards and committees should reflect, to the extent practicable, the diversity of individuals served by the program. AMS encourages representation of women, minorities, and persons with disabilities on the boards.

The nomination package will be submitted to the Office of the Secretary through the Administrator of AMS, in accordance with established timeframes.

K. *Debt Management.* AMS commodity divisions shall be guided by the authorities outlined in AMS Directive 420.3 (Appendix 2) for writing off uncollectible assessments and late fees.

L. *Other Government Agencies.* AMS will be responsible for developing appropriate working relationships with other government agencies which have responsibilities related to these programs. For example, AMS commodity divisions will be responsible for assuring close coordination with the Foreign Agricultural Service (FAS) anytime checkoff funds are used for foreign activities. FAS has oversight responsibility of the Foreign Market Development (FMD) and the Marketing Promotion Programs (MPP), and checkoff funding is made available to some participants in these FAS supervised programs. However, in all cases, FAS must have the opportunity to approve the boards' budgets, plans, and projects that focus on international activities. FAS approval will be subject to compliance with the checkoff legislation as well as other FAS requirements. Likewise, for programs with import checkoff provisions, it is the responsibility of AMS commodity divisions to maintain a close liaison with the U.S. Customs Service. Similarly, as required by section 1999T of the Food, Agriculture, Conservation, and Trade Act of 1990, AMS will consult with the United States Trade Representative on any proposed new or amended research and promotion order or plan which would assess imports.

/s/ [ILLEGIBLE]

Appendix 1—Investment of Public Funds
Appendix 2—Debt Management

APPENDIX J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 14, 2002]

No. 3:02cv00529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN N. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF JOHN R. MENGEL

JOHN R. MENGEL says:

1. I am the Chief Economist for Dairy Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture. I have been employed in Dairy Programs in my current position since 1997. Dairy Programs of AMS is headed by a Deputy Administrator. In the absence of the Deputy Administrator. I act in that position. As Chief Economist, I am responsible for all economic analysis of the Federal Milk Marketing Order Program, and oversee Dairy Market News, Federal Milk Marketing data collection and dissemination, and AMS' oversight of the two national dairy research and promotion programs. The National Dairy Promotion and Research Program is the program being challenged in this case.

2. All advertising that Dairy Management Inc. (DMI) creates or wishes to use requires advance approval by Dairy Programs before public dissemination. Normal practice is to attend meetings, participate in conference calls, and review

materials to address any concerns that Dairy Programs may have with DMI staff members in the developmental stage of advertisements. Consistently, advertising has been altered by DMI to meet Dairy Programs' concerns. No advertising to which Dairy Programs has objected has ever been used by DMI until the concerns of Dairy Programs have been addressed.

3. In 1998, DMI requested the approval of Dairy Programs to broadcast a television commercial, entitled "Paws," that the California Fluid Milk Processor Advisory Board (CFMPAB) had developed. Initially, approval was denied. Letters addressing the issues in the denial were submitted by staff members of CFMPAB and by DMI, articulating the basis for the content of the commercial. In addition, the Chief Executive Officer of the United Soybean Board wrote a letter allaying the concern of Dairy Programs that the ad was disparaging to soybeans or the soybean industry. After careful consideration of the submitted materials and consultation with officials in AMS, including the Administrator's office and other commodity promotion groups, approval was given by Dairy Programs to proceed with airing the commercial with the stipulation that if opposition was raised, the commercial would be removed from television.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 2002.

/s/ John R. Mengel
JOHN R. MENGEL

APPENDIX K

United States Department of Agriculture
Agricultural Marketing Service
P.O. Box 96456
Washington, DC 20090-6456

TO: Thomas M. Walsh
Assistant General Counsel
Marketing Division, OGC

THROUGH: Richard M. McKee
Acting Director
Dairy Division

FROM: Eugene E. Krueger, Head
Promotion and Research Staff B
Dairy Division

SUBJECT: Contract between the National Dairy Promotion and Research Board (NDB) and the United Dairy Industry Association (UDIA) to Create the Joint Venture Dairy Management, Inc.

ISSUE:

The attached contract between NDB and UDIA is to create a joint venture called Dairy Management, Inc., (DMI). DMI would provide staffing support to both NDB and UDIA.

BACKGROUND:

A lack of generic promotion coordination between the national and State and regional programs has been a regular dairy producer complaint since the beginning of the Dairy Promotion Program. The DMI joint venture (approved by NDB at its March 1994 meeting) is another in a long series of steps taken by NDB to increase this coordination.

DMI will not be a merger of NDB and UDIA. It will be a merger of their separate staffs into a single staff that serves

both organizations. The Dairy Promotion and Research Order (7 CFR 1150) in section 140(c) states that the National Dairy Board has the duty "to appoint or employ such persons as it may deem necessary." It is the duty of NDB and not the Department to establish NDB's staffing needs and organizational structure.

RECOMMENDATION:

Concurrence: /s/ Thomas M. Walsh
Date: 6/7/94

Attachment

[LOGO] The Agricultural Marketing Service
is an agency of the
United States Department of Agriculture

APPENDIX L

CALIFORNIA MILK PROCESSOR BOARD
Jeff Manning
Executive Director

September 11, 1998

David Jamison
USDA
14th & Independence SW
Washington DC 20250

Deaf David:

This follows up our very productive conversation and formally requests that the USDA reconsider its judgement on the, "Paws" GOT MILK? Commercial. As the Licensor of the GOT MILK? tradernark, this request is being made on behalf of Dairy Management Inc. (DMI) and their state and regional units (S&Rs).

Backgroound

• The California Milk Processor Board (CMPB) began running GOT MILK? advertising in late 1993. In the Fall of 1995 DMI made the decision to license the, trademark and campaign for use nationally and by its S&Rs. This has proven to an exceptional arrangement for all parties. As a result of this licensing agreement, plus the integration of the DMI and MilkPEP marketing programs, MilkPEP also began licensing the trademark in July of 1998.

• In May and June, 1998 the CMPB developed three new Commercials for use in. California ("Halt of Mirrors," "Paws" and "Animal Crackers"). These were presented to DMI and its member managers in script form and produced in July and August. ("Animal Crackers" is still in production.)

"Hall of Mirrors" and "Paws" went on air in California in September and they immediately became available to DMI and its S&Rs.

• In late August, 1998, DMI received your letter (Exhibit 1) stating that "Paws" was not appropriate for use in light of Departmental regulations and guidelines. Specifically, the Department judged that it: 1) ". . . made use of unfair or deceptive acts or practice with the respect to the quality, value or use of any competing product," (non-dairy creamer) and 2) ". . . is potentially disparaging to another agricultural commodity because non-dairy creamers routinely contain ingredients from soybeans."

• Given the importance of this commercial to DMI and its S&Rs, we decided to pursue the matter. As we discussed, the dairy industry has the right to appeal the decision and the Department is open to this appeal.

Proposal

This proposes that the Department reconsider its decision regarding "Paws" and, based on the evidence and arguments presented below, allow the .dairy industry to use this commercial in its struggle against competitive beverages.

Rationale

• This commercial does not "make use of unfair or deceptive acts or practices" nor does it devalue or disparage non-dairy creamers. Consumers understand that the GOT MILK? campaign is a spoof. They also understand that non-dairy creamer is not intended to be used for cats. We are no more serious about the use of non-dairy creamer for cats than we were about a history buff losing $10,000 because he had a mouth full of peanut butter, or a father attempting to take milk from his baby's bottle for his cereal. Further, no claims or direct comparisons were made in the "Paws" spot.

At no time in the research did consumers raise the issue of the quality or value of non-dairy creamer for its intended purpose. In fact, they hardly mentioned non-dairy creamer at all. Rather, they were squarely focused on the plight of the milk-deprived grandmother (which is why "Paws" is so valuable to the milk industry).

• "Paws" is not disparaging to another agricultural commodity, Non-dairy creamer is probably as far from an agricultural product as one could get. It's highly processed and contains a long list of artificial ingredients. I am convinced that if asked, consumers would not have any idea what crop (if any) was used in the manufacture of non-dairy creamer.

Additionally we do not .mention or portray any agricultural food product. The packaging in the commercial is totally generic and void of any brand or ingredient mentions: The issue of ingredients was never raised by consumers in the research.

• The commercial certainly does not disparage soybeans. The commercial does not reference soybeans visually or in copy. The word "soybean" never surfaced in consumer research.

And finally, John Becherer, CEO of the United Soybean Board, has viewed "Paws" and does not have any concerns regarding its use by the dairy industry. His letter confirming this is attached as Exhibit II.

• There is no evidence that "Paws" is not appropriate for use. Had we either used soy milk or shown people rejecting nondairy creamer for their coffee, we would concur with the Department's interpretation. However, as it stands, we believe that "Paws" is consistent, with the entire GOT MILK? campaign and appropriate for use within the regulations and guidelines.

• "Paws" is crucial to the dairy industry. It has a value of nearly $500,000. It is, based on research and judgement, one of our most powerful commercials against adults. It has already been presented dairy groups from around the country and they are extremely exited about using it, It is one of only three new spots available for use in 1998 and early 1999. And it comes at a time when the dairy industry needs every marketing "bullet" it can get.

• We need never be in this position again. We will make a commitment to submit, through DMI, storyboards of all future commercials available for licensing. In this manner, the industry will receive your input before production dollars are invested and while adjustments can still be made.

• Allowing the industry to use "Paws" does not involve any risk on the Department's part. We believe that we have provided enough new evidence and thinking to justify its use; Therefore, should the Department ever receive a question or complaint, you will have very strong grounds for your position and the full support of both milk producers and processors.

• "Paws" is not negative or malevolent. The humor is consistent with all of the GOT MILK? commercials, dating back to our first spots in 1993. America loves GOT MILK? because funny, outrageous things happen to GOT MILK? characters. And consumers loved "Paws." They smirked, they giggled and they laughed out loud when shown the spot. There was not the slightest evidence that they felt it conveyed a negative or harmful message. It simply reminded them of how important it is to have plenty of milk in the refrigerator.

David, I apologize for the length of this note. However, as you can tell, the industry feels very strongly that this commercial deserves to run, We therefore ask that the Department 1) reconsider "Paws" in light of this evidence and 2) support milk producers and processors by allowing its use. We also

want to restate our commitment to submit new GOT MILK? spots through DMI before production begins.

Please let Linda Racicot (DMI) and I know if it would be valuable for us to present our case in person. We would welcome the opportunity if it would increase the chance to use "Paws" by even t h e smallest margin.

Lastly, it has been a pleasure speaking with you and I hope we get to work more closely in the future.

Sincerely,

/s/ [Illegible]

cc: Tom Gallagher, Lionda Racicot, Chick Powell

APPENDIX M

DMI DAIRY MANAGEMENT INC.™

AMERICAN DAIRY ASSOCIATION
NATIONAL DAIRY COUNCIL
U.S. DAIRY EXPORT COUNCIL

September 14, 1998

David R. Jamison, Chief
U.S. Department of Agriculture
Dairy Division, Promotion and Research Branch
Room 2734-S, Stop 0233
1400 Independence Ave., S.W.
Washington, DC 20250-0233

Dear David:

We have received your letter concerning the "got milk" television advertisement entitled "Paws". We would ask that USDA rereview the advertisement on the following grounds:

The intention of the "got milk" commercials is to present a humorous depiction of running out of milk. In this version, the non-dairy creamer was meant to pose a humorous situation where the woman ran out of milk and tried to substitute another product.

The use of non-dairy creamer was in a non-conventional manner. Non-dairy creamer is not intended to be substituted for milk as a beverage. Had non-dairy creamer been compared to milk usage as an additive in coffee, we would agree that would be disparaging

While it is true that non-dairy creamers are composed of soybean-derived ingredients, there is not a direct mention of that commodity product. Unless the consumer is familiar with the composition of non-dairy creamers, we would not estimate that they would make the connection.

As a result of the review, we understand that Jeff Manning, Executive Director of the CMPB, is willing to make changes in his approach to developing creative for television advertisements. This would include the use of storyboards, which would be reviewed by you and your team prior to production of commercials. We find this an acceptable practice, which could help us to avoid such issues in the future We would hope that you would find this an acceptable change in the procedure.

Please keep me informed of any decisions made by USDA with regard to these commercials.

Sincerely,

/s/ Linda D. Racicot, Ph.D.
LINDA D. RACICOT, PH.D.
Group Executive
Domestic Marketing Operations

APPENDIX N

Mr. Charles Powell
Vice President Milk Marketing
Dairy Management Inc.
10255 West Higgins Road, Suite 900
Rosemont, Illinois 60018-5616

Dear Chuck:

Thank you for providing us with the proposed "got milk?" television advertisements entitled "Paws" and "Hall of Mirrors" that were developed by Goodby, Silverstein & Partners. It is our understanding that the ads have not been aired yet by Dairy Management Inc. (DMI). We have carefully reviewed the ads. Based upon our review, the "Paws" ad is not appropriate for use in light of Departmental regulations and guidelines. The use of any assessment funds from either the National Dairy Promotion Program or the National Fluid Milk Processor Promotion Program is prohibited concerning this ad.

As you are aware, the Dairy Promotion and Research Order states that no plan or project authorized under the Section shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product (Section 1150.161(c)). The use of the non-dairy creamer in the "Paws" ad does not conform with this provision. The ad portrays the creamer as an inferior product when substituted for milk. In addition, the ad is potentially disparaging to another agricultural commodity because nondairy creamers routinely contain ingredients derived from soybeans. The ad is also inappropriate for the same reasons under the Guidelines for the Agricultural Marketing Service's Oversight of Commodity Research and Promotion Programs which applies to all generic commodity research and promotion programs.

We appreciate your efforts to keep us informed of the new advertising materials being considered by DMI.

If you have any questions on this subject, please call give me a call at (202) 720-6909.

Sincerely,

/s/ David R Jamison
David R Jamison
Chief, Promotion and Research Branch
Dairy Programs

cc: Thomas Gallagher, Chief Executive Officer, DMI
Linda Racicot Ph.D., Group Executive, Domestic Marketing Operations, DMI
Jeff Manning, Executive Director, California Fluid Milk Processor Board

APPENDIX O

[LOGO]
UNITED SOYBEAN BOARD
Making Your Checkoff Pay Off.

September 11, 1998

Mr. Jeff Manning
California Milk Processors Board
1801A Fourth Street
Berkley, CA 94708

Dear Jeff:

I appreciated the opportunity to discuss the "Milk Paws" commercial with you. Subsequently, I received a copy of the commercial in the mail and have reviewed it. I did not find it in any way disparaging to soybeans or the soybean industry.

I appreciate you bringing this to my attention and for my consideration.

Sincerely,

/s/ John Becherer
John Becherer
Chief Executive Officer

APPENDIX P

[LOGO]

United States Department of Agriculture
Rural Business-Cooperative Service
RBS Research Report 173

Marketing Operations of Dairy Cooperatives

Abstract The Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83 percent of all milk sold to plants and dealers, in 1997. These cooperatives were owned by 87,938 member-producers. Sixty-three cooperatives operated 203 dairy processing and manufacturing plants, 25 with milk-receiving stations only and 138 with no milk-handling facilities. Cooperatives sold 14 percent of the Nation's packaged fluid products, 6 percent of the ice cream, 61 percent of the butter, 76 percent of the dry milk products, 40 percent of the natural cheese, 48 percent of the dry whey products, and 10 percent of the cottage cheese.

Key words: Cooperatives, dairy products, marketing, milk, structure.

Marketing Operations of Dairy Cooperatives

K. Charles Ling
Rural Business-Cooperative Service

RBS Research Report 173

June 1999

Preface: Information for this report came primarily from a survey of all U.S. dairy cooperatives. In some cases, data were estimated for nonrespondents based on their financial statements or other sources.

Data covers cooperatives' fiscal year ending in calendar 1997. These fiscal years vary within the calendar year, so their data reflect some differences in time periods. This report updates ACS Research Report 133 based on cooperative operations for the fiscal year ending in calendar 1992.

Because of the rapid cooperative structural changes in recent years, some of the larger cooperatives have significant operations in regions other than where cooperatives are headquartered. Regional marketing data on cooperative operations based on where cooperatives are headquartered are no longer meaningful and are discontinued in this report.

The author acknowledges assistance from some State agencies for this study, plus USDA's National Agricultural Statistics Service and particularly Federal milk market administrators for supplying data as authorized by some cooperatives.

(2) (3)

Nos. 04-166, 04-446

Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRED LOVELL, *et al.*,

Petitioners,

v.

JOSEPH S. COCHRAN and BRENDA S. COCHRAN,

Respondents.

ANN VENEMAN, Secretary, United States Department of Agriculture, *et al.*,

Petitioners,

v.

JOSEPH S. COCHRAN and BRENDA S. COCHRAN,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS

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BRIEF IN OPPOSITION

Respondents Joseph and Brenda Cochran, by counsel, respectfully request that this Court deny the petitions for writs of certiorari seeking review of the Third Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' Appendix in No. 04-446 (hereinafter "Gov. Pet. App.") 1a-34a) is reported at 359 F.3d 263 (3rd Cir. 2004). The opinion of the district court (Gov. Pet. App. 35a-53a) is reported at 252 F. Supp. 2d 126 (M.D. Pa. 2003).

STATEMENT

Respondents Joseph and Brenda Cochran operate a small commercial dairy farm in Tioga County, Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ traditional methods of dairy farming, which means that they place as much emphasis on how their milk is produced as on how much of it they produce. The Cochrans thus allow their cows more time and room to graze and calve, and they do not use bovine growth hormone. The Cochrans believe that their methods result in healthier cows, a cleaner environment, and superior milk. Respondents' Appendix (hereinafter "Resp. App.") 14-15. Under the Dairy Promotion Stabilization Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4501 *et seq.* (the "Dairy Promotion Act"), however, the Cochrans must pay roughly $3500 to $4000 per year to fund advertising and promotional programs that convey the message that all milk is the same. Resp. App. 14. The Cochrans

disagree with the message of the advertising they are required to finance under the Dairy Promotion Act, and they object to being required to support it. Resp. App. 1.

The Dairy Promotion Act is one in a long series of federal "checkoff" programs for agricultural commodities. Passed in 1983 at the behest of dairy producers,[1] the Act authorizes the Secretary of Agriculture to establish a program for "advertisement and promotion of the sale and consumption of dairy products" and for "research projects related thereto." 7 U.S.C. § 4504(a). The Act was passed to establish an "orderly procedure for developing, financing . . . and carrying out, a coordinated program of promotion" designed to strengthen and expand markets for dairy products. 7 U.S.C. § 4501(b). "Promotion" is defined as "paid advertising, sales promotion and publicity." *Id.* § 4504(a). Even the research funded under the Act must be directed toward the promotion of dairy products. *Id.* To administer the Dairy Program, the Act directs the Secretary to appoint a National Dairy Promotion and Research Board (the "Dairy Board") composed of private milk producers to develop and oversee promotional programs under the Act. *Id.* § 4505(b) & (c). Members of the Dairy Board are nominated by "eligible associations," which are associations of milk producers that engage in dairy promotion at the state and regional level. *See* 7 C.F.R. §§ 1150.133, 1150.273; Resp. App. 27-28. To finance promotional programs and the actions of

---

[1] *See, e.g.*, S. Rep. No. 98-163 at 18, *reprinted in* 1983 U.S.C.C.A.N. 1658 (stating that the idea for the Act came from producer groups); http://www.dairycheckoff.com/history.htm ("With the help of a dairy producer referendum calling for national dairy promotion, Congress enacted The Dairy and Tobacco Adjustment Act.").

the Board in administering them, the Act provides for mandatory assessments to be paid by milk producers of 15 cents per hundredweight of milk sold. 7 U.S.C. § 4504(g).

The Secretary of Agriculture issued an order consistent with the Dairy Promotion Act in March 1984. *See* 49 Fed. Reg. 11806-1. Among other things, the order established the Dairy Board, 7 C.F.R. § 1150.131, prescribed its powers and duties, among which are to "receive and evaluate, or on its own initiative develop ... plans or projects to promote the use of fluid milk and dairy products," *id.* § 1150.139, and required all milk producers to pay assessments to support such promotional programs, *id.* § 1150.152.

The Dairy Board has primary responsibility for administering the dairy program and discharging the purposes of the Act. Petitioners' Appendix in No. 04-166 (hereinafter "Lovell Pet. App.") 113a-114a; Resp. App. 27. Its responsibilities include proposing, developing, and administering promotional and research programs under the Act, preparing budgets, reporting to the Secretary on the dairy program, and proposing changes to the Secretary's Order. *See* 7 U.S.C. § 4504(c); 7 C.F.R. §§ 1150.139, 1150.140. In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation, which now oversees and administers the promotional programs that are conducted under the Dairy Act. Resp. App. 28-29. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association, which is an association of state and regional dairy promotional programs. Resp. App. 28-29, 100.

All advertising and promotional programs created by DMI and financed by compelled subsidies under the Dairy Promotion Act promote milk as a generic product. *See* 7 C.F.R. § 1150.114; Resp. App. 39-42; Lovell Pet. App. 44a. The advertisements convey the message that all milk is essentially the same regardless of who produces it and how it is produced. Resp. App. 14-15. Advertising under the Act is attributed to dairy producers like the Cochrans, whether they agree with the advertising or not. Resp. App. 14, 118. Perhaps the best known promotional program financed under the Dairy Promotion Act is the "got milk?" advertising campaign, which began running nationally in 1995 and still runs today. Resp. App. 46-48. The Dairy Promotion Act is also responsible for the "Ahh, the power of cheese" advertising campaign. Resp. App. 32.

The dairy program was established as an industry self-help program and has always been understood to be a private, non-governmental promotional program. Resp. App. 22-23. The Dairy Board and the board of DMI are composed entirely of private milk producers and other private parties, and the program is funded entirely by private milk producers. Lovell Pet. App. 113a-114a; Resp. App. 118-121, 22-23. Even the Secretary's oversight functions for the dairy program are funded by the compelled subsidies under the Act – that is, by private milk producers – rather than by general tax revenues. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b); Lovell Pet. App. 21a; Resp. App. 22-23. The Dairy Board and DMI decide what promotional programs to fund and they administer those programs. 7 U.S.C. § 4504(c), (d), (f); Lovell Pet. App. 113a-114a (AMS guidelines stating that "funding for such programs is industry specific . . . and the programs directed by industry boards"). Indeed, a majority of milk

producers may vote to terminate the entire program for any reason under the Dairy Promotion Act's referendum provisions. *See* 7 U.S.C. §§ 4506(a), 4507(b); Resp. App. 118-121 (dairy checkoff website stating that "[d]airy producers . . . ultimately determine if the checkoff program is meeting expectations"). Even the Secretary does not possess that power under the Act. *See* 7 U.S.C. § 4507(a) (allowing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). *Cf.* § 4507(b).

While the Secretary does have oversight responsibilities under the Dairy Promotion Act, they amount in essence to ensuring that the program complies with the Act. As the guidelines promulgated by the Agricultural Marketing Service, the entity that conducts the Secretary's oversight functions, make clear, "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." Lovell Pet. App. 114a. These functions include approving budgets and contracts, providing guidance on allocation of funds, reviewing financial statements, and approving advertising programs. *Id.* 114a-123a; Resp. App. 60-64. AMS will disapprove only advertisements "which it considers to be disparaging to another commodity or in violation of the prohibition against false and misleading advertising" contained in the Act. Lovell Pet. App. 118a.

The Cochrans filed suit in the Middle District of Pennsylvania on April 2, 2002, contending that the Dairy Promotion Act violates their First Amendment rights to free speech and association by requiring them to fund a

program of speech with which they disagree. On March 24, 2003, the district court concluded on cross motions for summary judgment that the Dairy Promotion Act was a valid economic regulation that did not violate the Cochran's rights to free speech and association. Gov. Pet. App. 48a-49a, 53a. The Cochrans timely appealed to the Third Circuit, which reversed the district court's decision on February 24, 2004.

The Third Circuit first held that the Dairy Promotion Act required dairy farmers to fund a program of private, rather than government, speech and was therefore not immune from scrutiny under the First Amendment. Gov. Pet. App. 19a-20a. Relying on the analysis of its earlier decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), as well as the Eighth and Sixth Circuit decisions in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petitions for cert. filed*, 72 USLW 3059 (Jan. 20, 2004) (No. 03-1043) and 72 USLW 3539 (Feb. 19, 2004) (No. 03-1180), and *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003), *cert. granted*, 72 USLW 3725 and 3721 (May 24, 2004) (Nos. 03-1164 and 03-1165), the court concluded that the Secretary's supervisory responsibilities under the Dairy Act are not sufficient to transform an industry self-help program that the government itself describes as non-governmental into a program of government speech. *See* Gov. Pet. App. 19a.

Next, the Third Circuit addressed the question of whether the Dairy Promotion Act was unconstitutional under this Court's decision in *United States v. United Foods*, 533 U.S. 405 (2001), or whether dairy producers are sufficiently "bound together" in a compelled association for purposes other than speech to render the Act constitutional under *Glickman v. Wileman Bros. & Elliot, Inc.*, 521

U.S. 468 (1997). *See* Gov. Pet. App. 20a. Finding the Dairy Promotion Act nearly identical in structure and purpose to the mushroom act struck down in *United Foods*, the Third Circuit concluded that the Dairy Promotion Act was unconstitutional under the same rationale that this Court employed in *United Foods*. As a general rule, the First Amendment prevents government from compelling individuals to fund speech or an association whose sole purpose is speech. *Id.* 20a-21a. Only where individuals are otherwise compelled to associate for non-speech purposes may government compel them to fund speech that is germane to the purposes for which the association was brought together. *Id.* 21a. In short, according to the Third Circuit, *Glickman* applies "only in circumstances similar to *Abood* and *Keller* – in which individuals are 'bound together' in a collective enterprise such as a union or an integrated state bar, and the compelled subsidies are the 'logical concomitant of a valid scheme of economic regulation.'" *Id.* (citation omitted).

While the dairy industry is subject to a "patchwork of state and federal laws," as the Third Circuit put it, "there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar, or the collective enterprise at issue in *Glickman*." *Id.* 21a-22a. Instead, the Third Circuit found that the Dairy Promotion Act "is a free-standing promotional program that applies to all dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations." *Id.* 22a. Because the sole purpose of the Dairy Promotion Act is speech and promotion, the Third Circuit concluded that it was unconstitutional under this Court's ruling in *United Foods*. *Id.* 23a.

Finally, the Third Circuit addressed whether the Dairy Promotion Act was constitutional under the *Central Hudson* test applicable to commercial speech regulations. Although one judge on the panel did not believe it was even necessary to determine that question, *id.* 32a-34a, the entire panel agreed that, in light of this Court's conclusion in *United Foods* that "the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product," *id.* 29a, the Dairy Promotion Act was unconstitutional even under intermediate scrutiny applicable to commercial speech. *Id.* 29a, 34a.

REASONS FOR DENYING THE PETITION

In ruling that the Dairy Promotion Act is unconstitutional under the First Amendment, the Third Circuit joined every other federal circuit court that has decided a case involving an agricultural promotional act since this Court decided *United Foods*. The Third Circuit correctly concluded that the Dairy Promotion Act unconstitutionally compels dairy farmers like the Cochrans to fund advertising with which they disagree. That decision is not altered by the fact that there are other federal and state laws that regulate the dairy industry. Most industries in this country are subject to federal and state regulations. Under *United Foods*, however, compelled subsidies for speech are constitutional only where they are part of an otherwise constitutionally valid *compelled association* whose primary purpose is something other than speech. The Cochrans, and, indeed, all dairy farmers, are not compelled to associate with other dairy farmers under any federal law except the Dairy Promotion Act itself. The sole purpose of the

Dairy Promotion Act, like the mushroom act struck down in *United Foods*, is speech. The Act is therefore unconstitutional for precisely the same reasons this Court held the mushroom act unconstitutional in *United Foods*. The petitioners' implicit claim that the entire dairy industry is tantamount to a gigantic, nationwide union or other compelled association is flatly inconsistent with the facts of the industry and the federal regulations on which petitioners rely. The Dairy Promotion Act creates a stand-alone program that was established as an industry self-help measure like many other similar federal programs. It functions independently of any other law and cannot be said to be ancillary to any association in which dairy producers are compelled to participate.

Nor is there any split among the circuits on this question, as petitioners claim. The cases on which they rely were decided *before* this Court decided *United Foods* and two of those cases are unreported decisions that are not even precedent in their own circuits. The Third Circuit is the only federal circuit to address the constitutionality of the Dairy Promotion Act since this Court decided *United Foods*, and its decision is entirely consistent with that case and with this Court's other decisions on point. There is thus no reason for this Court to grant the petitions.

As for petitioners' arguments that the speech financed under the Dairy Promotion Act is "government speech" and immune from First Amendment scrutiny and that the Dairy Promotion Act is constitutional under *Central Hudson*, those issues are currently before the Court in *Veneman v. Livestock Marketing Ass'n.*, No. 03-1164, and *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n.*, No. 03-1165, as petitioners admit. Respondents disagree with petitioners' arguments on these points and agree with

the position of the respondents in *Livestock Marketing*. *See* Brief of Livestock Marketing Ass'n. in Nos. 03-1164 and 03-1165. In any event, those issues will be resolved in the *Livestock Marketing* cases and there is no reason for this Court to grant the petitions in this case on those grounds. The petitions should therefore be denied.

I. THE THIRD CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN *UNITED FOODS* IN CONCLUDING THAT THE DAIRY PROMOTION ACT UNCONSTITUTIONALLY REQUIRES DAIRY FARMERS TO FUND SPEECH WITH WHICH THEY DISAGREE.

In *United States v. United Foods*, 533 U.S. 405 (2001), this Court reaffirmed three fundamental First Amendment principles that control the outcome of this case. First, the right not to be compelled to subsidize speech is the rule under the First Amendment, and compelled subsidies for speech is the exception. As the Court stated in *United Foods*, the "general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 411 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). Thus,

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

Id. See also, *Wooley v. Maynard*, 430 U.S. 705 (1976) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."); *Abood*

v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.").

The second principle follows from the first: it is only in a narrow class of cases that government may compel individuals to subsidize speech with which they disagree. Only where individuals are already compelled to associate for an otherwise constitutional *non-speech* purpose may the mandatory dues or assessments they pay for that purpose be used to subsidize speech, and then only where the speech is germane to the purposes for which the compelled association was justified in the first place. *See United Foods*, 533 U.S. at 413-415. As this Court put it in *United Foods*, only where a "threshold inquiry" indicates that "there is some state imposed obligation which makes group membership less than voluntary" are compelled subsidies for speech permissible, "for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *Id.* at 413. Thus, unions may spend mandatory dues on speech germane to collective bargaining and state bar associations may spend mandatory dues on speech germane to the regulation of the legal profession. *Abood*, 431 U.S. at 235-36; *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990). But Congress may not pass a law compelling individuals to subsidize the speech of others simply because it wishes to increase demand for a particular product. *United Foods*, 533 U.S. at 413-14. Such a law would run afoul of the express language of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech."

Third, the government may not compel individuals to subsidize speech under a program whose principal object is speech itself. As the Court stated in *United Foods*, "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. . . . Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *Id.* at 415.

Under these principles, the Third Circuit's conclusion follows as a matter of course. The Dairy Promotion Act compels dairy producers to subsidize the speech of others whether they agree with that speech or not. The Act establishes a stand-alone program that functions independently of any other federal or state dairy law or regulation, and it has no regulatory purpose beyond financing a program of speech. Indeed, the Act itself makes clear that "[n]othing in this subtitle may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk or the right of any person to import dairy products." 7 U.S.C. § 4501(b). While dairy farmers may join cooperatives without running afoul of the antitrust laws, *see* 7 U.S.C. § 291, there is no law or regulation that requires all dairy producers to associate or otherwise to act in concert with one another. Indeed, the Agricultural Fair Practices Act of 1967 ensures that dairy farmers may not be forced to join cooperatives. *See* 7 U.S.C. § 2301 *et seq.*; *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984). And while the dairy industry is subject to marketing orders under the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, milk marketing orders operate on a regional basis and operate directly on milk

handlers – regulating the price they must pay for milk – rather than milk *producers* like the Cochrans. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq.*[3] By contrast, the Dairy Promotion Act operates on a national basis, requiring every dairy producer in the country to pay subsidies for speech regardless of whether they sell milk that is subject to regional marketing orders. Indeed, the AMAA contains a provision that authorizes voluntary subsidies for advertising programs under milk marketing orders, 7 U.S.C. § 608c(5)(I), but Congress chose not to establish the dairy program under that provision.

In short, to contend, as petitioners do, that the compelled subsidies under the Dairy Promotion Act are "ancillary" to a broader collective enterprise with a purpose independent of speech is to strip those terms of all meaning and significance and to render this Court's decision in *United Foods* a nullity. In refusing to take that tack, the Third Circuit did nothing more exceptional than to faithfully interpret and apply this Court's decisions.

In claiming that this Court's decision in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 468 (1997), commands a contrary result, petitioners misunderstand the holdings of both *Glickman* and *United Foods*. *See* Gov. Pet. Brf. at 11-14; Lovell Pet. Brf. at 13. As this Court made clear in *United Foods*, *Glickman* applies only where individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid

[3] The AMAA specifically exempts producers, such as dairy farmers, from the application of marketing orders. *See* 7 U.S.C. § 608c(13)(B) (stating that no marketing order "shall be applicable to any producer in his capacity as a producer"); Lovell Pet. App. 106a-108a.

scheme of economic regulation." *See United Foods*, 533 U.S. at 413-14. The compelled subsidies upheld in *Glickman* were part of the very same marketing orders that regulated many other aspects of the market for the California tree fruits at issue in the case. *See* 521 U.S. at 463. The objecting producer in the case was already compelled to associate for economic purposes under the marketing orders and was already compelled to pay assessments for that broader *non-speech* purpose. *See id.* at 469. The mandatory assessments in *Glickman* were thus analogous to union dues or bar fees assessed for broader regulatory purposes than simply speech. *See id.* at 469, 473; *United Foods*, 533 U.S. at 413-14. They were part of one collective enterprise that covered all producers in the market and were clearly ancillary to that enterprise. *See United Foods*, 533 U.S. at 411-12.

There is no milk industry regulation analogous to the two marketing orders at issue in *Glickman* and no compulsory association of dairy producers analogous to those governed by the marketing orders at issue in that case. The fallacy underlying the petitioners' argument is that the entire national dairy industry is analogous to the associations of tree fruit producers governed by two marketing orders in California. Petitioners in essence contend that the entire dairy industry is tantamount to one gigantic union. But nothing in this Court's precedents would support such a tortured comparison. The constitutionality of compelled subsidies for speech turns on whether they are ancillary to a *compelled association*, not whether they apply in an industry that Congress has regulated over time through a patchwork of statutes. If the gradual accretion of regulations over the course of nearly a century becomes the touchstone for compelled subsidies

for speech, the participants in nearly every national industry in the country could properly be compelled to finance the speech of others. That is not the law under the First Amendment or this Court's decisions interpreting and applying it.

II. THERE IS NO CIRCUIT SPLIT.

Petitioners incorrectly claim that there is a split between the Third Circuit and the Sixth and Ninth Circuits on the constitutionality of the Dairy Promotion Act. However, this claim is based on three cases – *Nature's Dairy v. Glickman*, No. 98-1073, 1999 WL 137631 (6th Cir. Mar. 2, 1999) (unpublished; table decision reported at 173 F.3d 429); *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999); and *Gallo Cattle Co. v. U.S.D.A.*, No. 98-17318, 1999 WL 547427, (9th Cir. July 27, 1999) (unpublished; table decision reported at 189 F.3d 473) – that were decided before this Court issued its decision in *United Foods*, and two of the decisions are unpublished and thus not even precedent in their own circuits. Thus, there is no circuit split that would justify granting the petitions.

In *Nature's Dairy*, the Sixth Circuit upheld the Dairy Promotion Act over a First Amendment challenge on the grounds that federal regulation has "permeated the dairy industry" for years. 1999 WL 137631. Notably, the decision was issued *prior* to this Court's decision in *United Foods* and thus incorrectly relied on the overall amount of regulation in the industry in general, rather than on whether the Dairy Promotion Act was ancillary to an otherwise valid compelled association with a non-speech purpose. *See id.* The decision is scant on analysis and, as

an unpublished decision, is not even precedent in its own circuit. *See* Sixth Circuit Local Rule 28(g). This is presumably the reason the Sixth Circuit itself did not even mention the case in its subsequent *published* decision in *United Foods v. United States*, 197 F.3d 221 (6th Cir. 1999), the decision that this Court later affirmed in *United Foods*.

In *Gallo Cattle Co. v. California Milk Advisory Bd.* (*Gallo I*), the Ninth Circuit concluded that a California dairy promotional program authorized under a state statute similar to the Agricultural Marketing Agreement Act did not violate the First Amendment. 185 F.3d 969. The marketing orders in *Gallo I*, however, like those at issue in *Glickman*, both regulated the market for milk *and* authorized a promotional program. *See* 185 F.3d at 970-71. The statute was thus distinctly different from the Dairy Promotion Act, which pertains only to speech. *Gallo I* was also decided prior to *United Foods* and thus did not consider the importance of compelled association in its analysis, and it improperly relied on the fact that the compelled subsidies were germane only to advertising itself. *See* 185 F.3d at 974-75, 976-77. Indeed, as the Ninth Circuit itself later recognized, *Gallo I* is questionable precedent. *See Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003).

The private petitioners also rely on *Gallo Cattle Co. v. U.S.D.A.* (*Gallo II*) (Lovell Pet. at 15), in which the Ninth Circuit upheld the Dairy Promotion Act over a First Amendment challenge. 1999 WL 547427. This decision, too, preceded *United Foods*, and thus suffers from the same problems as *Gallo I* and *Nature's Dairy*. In addition, *Gallo II* is unpublished, and thus not precedent in the Ninth Circuit. *See* Ninth Circuit Local Rule 36-3.

The Third Circuit's decision is the only published decision of a federal circuit court to squarely address the constitutionality of the Dairy Promotion Act in light of this Court's relevant precedents. The Third Circuit's decision is entirely consistent with governing law and there is no reason for this Court to disturb it.

III. THERE IS NO OTHER REASON TO GRANT CERTIORARI.

The petitioners also contend that the Dairy Promotion Act creates a program of "government speech" which is immune from First Amendment scrutiny and that the Dairy Promotion Act is constitutional under this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). These arguments are wrong, as Respondents briefly demonstrate below. Indeed, the arguments amount to a request that this Court overrule its decision in *United Foods* on the grounds that the speech at issue was always that of the government, and the Court applied the wrong standard in that case. In any event, these arguments do not provide grounds on which to grant the petitions because the Court will fully address and resolve them this term in *Veneman v. Livestock Marketing Ass'n.*, No. 03-1164, and *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n.*, No. 03-1165.

Petitioners' claim that the Dairy Promotion Act creates a program of "government speech" that is immune from First Amendment scrutiny is wrong in both its factual and legal premises. As a factual matter, the dairy program is a private industry self-help program, financed and directed by and for dairy farmers, not the government, that creates advertising and promotional programs made

in the name of dairy farmers, not the government. *See, e.g.*, Resp. App. 22-23, 118-121. Perhaps the best description of the program appears on its own website: "Checkoff programs are funded by dairy producers – NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight." *Id.* 118-121. As this Court held in *Keller*, where a group's principal funding comes from dues imposed on its members, rather than from general tax revenues, its members are a select group of individuals, and its functions are specialized and designed to serve a narrow segment of the population, its speech is private, not government, speech. *See* 496 U.S. at 11-13. To claim, as petitioners do, that the dairy program is in reality a government program that finances government speech is not only to contradict all evidence to the contrary, it is to suggest duplicity on the part of the government and the Dairy Board, both of which have described the program to the public at every turn as anything *but* a government program. The petitioners' arguments are thus as disingenuous as they are wrong.

More fundamentally, as a legal and constitutional matter, this argument is based on a faulty premise: that attaching the label "government" to speech obviates the necessity of applying First Amendment scrutiny. While it is true that government may speak without having to answer to every taxpayer who disagrees with what it says, that is a far cry from petitioners' argument – that government may compel individuals to subsidize speech made in their own names so long as it controls the content of that speech. This Court has held in an unbroken line of cases that government may not compel individuals to speak in their own right, *Wooley v. Maynard*, 430 U.S. 705, 714 (1976); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S.

624 (1943), to subsidize speech with which they disagree, *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977); *Keller*, 496 U.S. at 11-13, *United Foods*, 533 U.S. at 413-415, or to associate with those with whom they disagree, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995). Petitioners seek nothing less than to uproot this long-standing precedent and to replace it with the perverse principle that the *greater* the government compulsion to speak or to subsidize speech and the *greater* the control it exerts over the message, the *less* First Amendment scrutiny that applies. This argument ignores the key distinction between cases in which government appropriately speaks in its own right and those in which it unconstitutionally compels individuals to speak: the source of funding and the attribution of the message. Where, as here, government compels individuals directly to fund a program of speech that is attributed to those individuals, it is not speaking in its own right, and its actions are subject to First Amendment scrutiny. *See Keller*, 496 U.S. at 11-13.

In short, as the Third Circuit recognized – along with every other federal circuit court that has addressed this issue in similar contexts – acts such as the Dairy Promotion Act compel individuals to finance *private*, not government, speech and are subject to exacting First Amendment scrutiny as a result. *See* Gov. Pet. App. 18a-20a.

Nor is the Dairy Promotion Act constitutional under the *Central Hudson* test. This Court rejected the same argument in *United Foods*, holding that even under intermediate scrutiny applicable to commercial speech, the mere desire to advertise agricultural products is not sufficient to justify compelling producers to subsidize

speech with which they disagree. *See* 533 U.S. at 415. The same rationale applies here. Like the mushroom act, the sole purpose of the Dairy Promotion Act is speech. And any legitimate interests the government may have in advertising such products can be accomplished by funding the programs through general tax revenues, rather than targeted assessments on producers, and attributing the advertising to the government, rather than private parties.

CONCLUSION

For the forgoing reasons, the petitions for writs of certiorari in case nos. 04-166 and 04-446 should be denied.

Respectfully submitted,

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NOVEMBER 1, 2004.

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran RR#4 Box 140 Westfield PA 16950 – PLAINTIFFS, VS. Ann Veneman, As Secretary, United States Department of Agriculture and National Dairy Promotion Board, – DEFENDANTS.	)	No. 4:CV-02-00529

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF
FRCP 57 and 28 U.S.C. §§ 2201 and 2202

(Filed Apr. 02, 2002)

SUMMARY OF ACTION

Joseph S. Cochran and Brenda S. Cochran (Cochrans), dairy producers located in Pennsylvania, who are not part of any collective body, in order to secure their right to speak or not speak as they, alone, choose, in the promotion of their milk products and not desiring to promote milk products manufactured by competitors of their customer, seek a declaratory judgment determining that Dairy Promotion Program, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4504(g) (Act) is an unconstitutional restriction on their right to free speech, because the Act

and the corresponding regulations require the Cochrans to monetarily support a program known as the Dairy Promotion Program and to join, against their will, in expressive association with other dairy producers solely for the purpose of funding speech even though they do not approve of that speech. The Act, which authorizes the Dairy Promotion Program and the creation of the National Dairy Promotion and Research Board, requires all dairy producers, including the Cochrans, to pay fifteen cents per hundredweight (cwt) on all their milk production for the purpose of compelled speech. Because it is so funded, all dairy farmers, including the Cochrans, are compelled to speak through compelled support of generic advertising in violation of the First Amendment to the U.S. Constitution. The United States Supreme Court has held that a similar promotion program for mushroom producers violates the First Amendment. *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001). A case and controversy exists between the plaintiff-producers and the defendants as to whether or not the compulsory dairy promotion program violates the First Amendment. As a remedy, the Cochrans seek injunctive relief, preliminary and final, that prohibits the Secretary from enforcing the compelled contribution portion of the Act.

PARTIES

Plaintiffs

1. The Cochrans are engaged in the production of milk for commercial use on a dairy farm located in Pennsylvania and, pursuant to the Act, are compelled to support the Dairy Promotion Program through the mandatory checkoff from their milk checks and through the attribution of the resulting speech to them as dairy producers.

Defendants

2. Ann Veneman is the Secretary of the United States Department of Agriculture and is authorized by law to administer the Act including the collection of assessments against milk production.

3. The National Dairy Promotion Board oversees the program and directs the expenditures.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a) because this claim arises under the Constitution of the United States, First Amendment and laws of the United States (to wit: Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128) and pursuant to 28 U.S.C. § 1346 because an officer and agency of the United States are proper party defendants.

5. This Court has the authority to issue a declaratory judgment by virtue of 28 U.S.C. §§ 2201 and 2202 and FRCP 57.

6. This Claim has been brought in the proper forum because all the plaintiffs are residents of Tioga County, Pennsylvania, and the defendant is an officer or agency of the United States. 28 U.S.C. § 1402 and 28 U.S.C. § 118(b)(1).

BACKGROUND

7. The Cochrans market the milk of their family farm independently.

8. The plaintiffs are currently forced to pay approximately $3500 to $4000 to the Dairy Promotion Program.

9. In 1983 Congress passed P.L. 98-180 known as the "Dairy Production Stabilization Act of 1983". 7 U.S.C. §§ 4501-4509.

10. The provision which gives rise to the instant lawsuit is found at 7 U.S.C. § 4504(g) which reads as follows:

> (g) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board. The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter. The rate of assessment prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof. A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending

six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983 of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed. Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

11. The sole purpose of the Act is to compel all dairy farmers including Cochrans to fund speech in which they either disagree or wish to remain silent. Though some funds are for research, the research is for the purpose of supporting the compelled speech.

12. The Dairy Promotion Act replaced the voluntary promotion programs that existed in many states and under the provisions of various federal milk marketing orders under the Agricultural Marketing Agreement Act. 7 U.S.C. § 608c.

13. The Act requires that any handler paying the Cochrans for their milk must reduce the amount of that payment by fifteen cents (15 cents) per cwt for Cochrans' contribution to the Dairy Promotion Program.

14. Producers who do not pay the assessment are subject to fines and penalties including a restraining order, a civil fine up to $1000 for each violation and, if willful, a penalty equal to 100 percent of the assessment levied. 7 U.S.C. § 4510. The power of the federal courts can be used to enforce compliance. *Id.* and 7 U.S.C. § 4511.

15. In 1983 the Secretary of Agriculture promulgated regulations for the administration of the Dairy

Promotion Program. These regulations are found at 7 C.F.R. Part 1150.

16. Pursuant to the Act, the Secretary issued regulations requiring all producers to contribute to the promotion. 7 C.F.R. § 1150.152(a) reads as follows:

> (A) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

17. The National Dairy Promotion Board oversees the use of the funds.

18. The Board is permitted by law to recommend amendments, which would include the continuance of the promotion order.

19. Though generally prohibited from engaging in political advocacy, the Board can, and does, directly and indirectly, spend funds collected in part from the Cochrans to "promote the promotion" among other dairy farmers. It does not spend any money or provide any resources for the support of those opposed to the promotion.

20. The 15 cent cwt assessment represents a significant portion of the gross profit margin of the Cochran's dairy operation. In some years the total assessment prevents the Cochrans from implementing essential farm management practices. Failure to implement these practices impairs Cochrans' ability to remain competitive in the ever-changing dairy industry.

21. The Cochrans operate a dairy farm using traditional farming methods. They contend that their use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet.

22. The generic advertising for milk and milk products, for which they are required to pay, denies the existence of the value of such alternative sources of milk by its implication that milk is a generic product and, thus, runs counter to the Cochran's own speech and views regarding the production and marketing of milk.

23. There is no identifiable principle that can distinguish out of hand that a debatable issue exists as to the total value of such marketing and production policies.

24. Aside from being compelled to support the promotion of milk products, the Cochrans have full marketing autonomy and, in fact, they annually and individually negotiate with processing plants for the purchase of the milk produced on their farm.

25. They market their milk outside of any cooperative marketing program that benefits from exemption from the antitrust laws.

26. There are no marketing regulations regarding the amount of production that Cochrans can produce or how they can sell their milk except for sanitary regulations.

27. All of the milk producers who participate like Cochrans in the Dairy Promotion Program are not otherwise so universally joined in any other collective activity.

28. The Dairy Promotion Program is a separate, stand alone, program that is not integrated into or made a part of other programs that involve dairy specifically and agriculture generally. It does not arise out of any collective activity of dairy producers.

29. Quality and grading of milk is done through separate state-local inspection programs administered by the state and local governments. They are not established by any collective activity of the producers.

30. Dairy producers may be further subject to other regulations, but none arise out of any collective activity in which the Cochrans participate voluntarily or involuntarily. Each operate under difference statutes different regulations, different administrative boards or commissions, and each have different purposes and scopes.

31. As milk producers, the Cochrans can not only decide whether to dairy, they can choose to produce grade B milk (for manufacturing purposes only) or grade a milk (for fluid as well as manufacturing purposes, and choose whether to individually market their milk or join in some way with the farmers to collectively market their milk.

32. The Cochrans cannot, however, choose whether or not to promote products manufactured by others and fund nutrition propaganda that counters, weakens, or does not further their own opinions as to the different nutritional values in their milk as contrasted with the milk generically promoted.

CAUSE OF ACTION

33. Compelled payment of money for the purpose of speech violates the First Amendment to the U.S. Constitution, which reads

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

34. The Dairy Promotion Program clearly violates the First Amendment because:

a. It compels the Cochrans to support speech with which they do not agree or which they do not wish to make.

b. It raises a direct and immediate infringement on the Cochrans' First Amendment rights because the assessment subsidizes speech that promotes the sale of dairy products that compete with the dairy products that the Cochrans' milk is used to manufacture.

c. The compulsory financial participation in the speech and the attribution of that speech to all dairy producers implies that Cochrans agree with the advertisements when in fact plaintiffs may not so agree.

d. It forces plaintiffs to expressly associate with other producers against their will for the sole purpose of sponsoring in speech and nothing else.

RELIEF SOUGHT

WHEREFORE, the Plaintiffs hereby demand relief as follows:

1483.02

A. That the Dairy Promotion Program, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128 (Act), 7 U.S.C. § 4504(g), be declared unconstitutional; and

B. That the defendant Secretary and her agents and those acting in concert therewith be enjoined, temporarily, preliminarily, and permanently from assessing plaintiffs for the Dairy Promotion Program and using funds collected from plaintiffs; and

C. That the defendant Secretary and Dairy Promotion Board and their agents and those acting in concert therewith be enjoined, temporarily, preliminarily, and permanently from compelling assessments in accordance with 7 C.F.R. § 1150.152 and using such funds without the consent of those assessed; and

D. That the defendant Secretary be directed to recoup and then refund any assessments collected by the Dairy Promotion Program from plaintiffs collected during the pendency of this case; and

E. Enjoin the defendants from using funds collected under the Dairy Promotion Program in defense of this claim; and

F. Award the plaintiffs attorneys fees and costs; and

G. Provide such other relief that is appropriate in the premises.

Respectfully Submitted

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran –PLAINTIFFS, VS. Ann Veneman, As Secretary, United States Department of Agriculture And National Dairy Promotion Board, –DEFENDANTS.	)	Judge James F. McClure, Jr. No. ~~3:00CV-02-0529~~ 4:02-CV-529

EXHIBITS IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

(Filed Jun. 6, 2002)

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June 5, 2002

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran **-PLAINTIFFS,** VS. Ann Veneman, As Secretary, United States Department of Agriculture and National Dairy Promotion Board, **-DEFENDANTS.**	JUDGE McCLURE No. 3:00CV-02-0529

DECLARATION OF JOSEPH S. COCHRAN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Joseph S. Cochran, being of lawful age, declares under penalty of perjury pursuant to 28 U.S.C. 1746:

1. The following testimony is given on my personal knowledge and belief and for purposes of supporting a motion for summary judgment in the case that is styled and numbered above.

2. I and my wife, Brenda Cochran, with our family, operate a dairy farm in Tioga County, Pennsylvania. Its address is RR#4 Box 140, Westfield, PA 16950.

3. At this farm we produce milk for commercial use.

4. We are forced to subsidize the Dairy Promotion Program through the mandatory checkoff from our milk checks.

5. Some of the advertisements say something to the effect "Brought to you by your local dairy farmer" or other similar statement that tends to attribute the message to me.

6. I have never had the opportunity to create, edit, approve or disapprove any advertisement or promotion that has been funded by the dairy checkoff.

7. We market the milk of our family farm independently.

8. We are currently forced to subsidize the Dairy Promotion Promotion Program of approximately $3500 to $4000 per year.

9. The 15 cent cwt assessment represents a significant portion of the gross profit margin of our dairy operation. In some years, the total assessment prevents us

from implementing essential farm management practices. Failure to implement these practices impairs our ability to remain competitive in the ever changing dairy industry.

10. We operate our dairy farm using traditional farming methods. It is our belief that the use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet.

11. Based upon our observation of dairy farming today, our methods differ from those used on most of the other commercial dairies.

12. Over the years, we have spoken out on this issue at a number of different formal and informal meetings.

13. The promotion of milk generically is speech that denies there is any difference in milk and thus the promotion program acts to counter our own beliefs and commitments to a way of farming.

14. We have full marketing autonomy. Annually we individually negotiate with various processing plants for the sale of our milk that we have produced on our farm.

15. We do not participate in any cooperative marketing program that benefits from exemption from the antitrust laws.

16. We are not subject to any marketing regulations that tell us how much or how little milk we can produce nor how we can market our milk.

17. We are subject to sanitary regulations but these have no bearing on the marketing or pricing of our milk. Quality and grading of milk is done through separate

state-local inspection programs administered by the state and local governments. These regulations do not arise out of any collective activity of the producers.

18. We are not joined with any of the other dairy producers that also subsidize the dairy promotion program in any way.

19. We retain the right to decide whether to dairy, whether to produce grade B milk (for manufacturing purposes only) or grade A milk (for fluid as well as manufacturing purposes), and whether to individually market our milk or join in some way with other farmers to collectively market our milk.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 4, 2002

/s/ Joseph S. Cochran
Joseph S. Cochran

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and	) JUDGE
Brenda S. Cochran	) JAMES F. McCLURE, JR.
– PLAINTIFF,	) No. 3:00CV-02-0529
VS.	)
	)
Ann Veneman, As Secretary,	)
United States Department	)
of Agriculture	)
and	)
National Dairy Promotion Board,	)
– DEFENDANTS.	)

PLAINTIFFS' STATEMENT OF FACTS NOT IN MATERIAL DISPUTE IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to the local rules, the Plaintiffs submit the following facts that are not in material dispute in support of their motion for summary judgment filed contemporaneously herewith.

1. Joseph S and Brenda Cochran, with their family, operate a dairy farm in Tioga County, Pennsylvania. Its address is RR#4 Box 140, Westfield, PA 16950. (Cochran Aff. ¶2).

2. Ann Veneman is the Secretary of the United States Department of Agriculture and is authorized by law to administer the Act including the collection of assessments against milk production.

3. The National Dairy Promotion Board oversees the program and directs the expenditures.

4. At that farm the Cochrans produce milk for commercial use. (Cochran Aff. ¶3)

5. They are forced to subsidize the Dairy Promotion Program through the mandatory checkoff from our milk checks. (Cochran Aff. ¶4)

6. Some of the advertisements funded by that program say something to the effect "Brought to you by your local dairy farmer" or other similar statement that tends to attribute the message to them. (Cochran Aff. ¶5)

7. Neither of the Cochrans have ever had the opportunity to create, edit, approve or disapprove any advertisement or promotion that has been funded by the dairy checkoff. (Cochran Aff. ¶6)

8. They market the milk of their family farm independently. (Cochran Aff. ¶7)

9. They are currently forced to subsidize the Dairy Promotion Program at approximately $3500 to $4000 per year. (Cochran Aff. ¶8)

10. The 15 cent cwt assessment represents a significant portion of the gross profit margin of their dairy operation. In some years, the total assessment prevents them from implementing essential farm management practices. Failure to implement these practices impairs their ability to remain competitive in the ever changing dairy industry. (Cochran Aff. ¶9)

11. They operate their dairy farm using traditional farming methods. It is their belief that the use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and their planet. (Cochran Aff. ¶10)

12. Based upon their observation of dairy farming today, their methods differ from those used on most of he other commercial dairies. (Cochran Aff. ¶11)

13. Over the year, they have spoken out on this issue at a number of different formal and informal meetings. (Cochran Aff. ¶12)

14. The promotion of milk generically is speech that denies there is any difference in milk and thus the promotion program acts to counter their own beliefs and commitments to a way of farming. (Cochran Aff. ¶13)

15. They have full marketing autonomy. Annually they individually negotiate with various processing plants

for the sale of their milk that they have produced on their farm. (Cochran Aff. ¶14)

16. They do not now participate in any cooperative marketing program that benefits from exemption from the antitrust laws. (Cochran Aff. ¶15)

17. They are not subject to any marketing regulations that tell them how much or how little milk they can produce nor how they can market their milk. (Cochran Aff. ¶16)

18. They are subject to sanitary regulations but these have no bearing on the marketing or pricing of their milk. Quality and grading of milk is done through separate state-local inspection programs administered by the state and local governments. These regulations do not arise out of any collective activity of the producers. (Cochran Aff. ¶17)

19. They are not joined with any of the other dairy producers that also subsidize the dairy promotion program in any way. (Cochran Aff. ¶18)

20. They retain the right to decide whether to dairy, whether to produce grade B milk (for manufacturing purposes only) or grade A milk (for fluid as well as manufacturing purposes), and whether to individually market their milk or join in some way with other farmers to collectively market their milk. (Cochran Aff. ¶19)

21. The Dairy Promotion Program is a separate, stand alone, program which is not integrated into or made a part of other programs that involve dairy specifically and agriculture generally. It does not arise out of any collective activity of dairy producers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of June, 2002, a copy of the foregoing was served by first class mail, postage prepaid on the following:

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USDA
REPORT TO CONGRESS
ON THE
DAIRY PROMOTION PROGRAMS
2001

INTRODUCTION

The enabling legislation of both the producer and processor dairy promotion programs (7 U.S.C. 4514 and 7 U.S.C. 6407) requires the U.S. Department of Agriculture (USDA) to submit an annual report to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry by July 1. The producer and processor programs are conducted under the Dairy Promotion and Research Order (Dairy Order) (7 CFR 1150) and the Fluid Milk Promotion Order (Fluid Milk Order) (7 CFR 1160), respectively. This report includes a description of activities for both the producer and processor programs and summarizes activities of their national integrated fluid milk program. An accounting of funds collected and spent, a fluid milk market analysis, and an independent analysis of the effectiveness of the advertising campaigns of the two programs also are included. This report addresses program activities for the fiscal period January 1 - December 31, 2000, of the dairy Promotion Program and the Fluid Milk Processor Promotion Program, unless otherwise noted.

PRODUCER DAIRY PROMOTION PROGRAM

The Dairy Production Stabilization Act of 1983 (Dairy Act) (7 U.S.C. 4501 *et seq.*) authorized a national producer program for dairy product promotion, research, and nutrition education as part of a comprehensive strategy to increase human consumption of milk and dairy products. Dairy farmers fund

this self-help program through a mandatory 15-cent per hundredweight assessment on all milk produced in the contiguous 48 States and marketed commercially. Dairy farmers administer the national program through the National Dairy Promotion and Research Board (Dairy Board). The Dairy Act provides that dairy farmers can direct up to 10 cents per hundredweight of the assessment for contributions to qualified State or regional dairy product promotion, research, or nutrition education programs (Qualified Programs).

The Dairy Order became effective on May 1, 1984. The Dairy Act required the Secretary of Agriculture to conduct a referendum among dairy farmers by September 30, 1985, to determine if a majority favored continuation of the program. Nearly 90 percent of the dairy farmers voting in the August-September 1985 referendum favored continuing the program. USDA held a second referendum on the dairy promotion program in August 1993. Approximately 71 percent of the dairy farmers who voted in the referendum favored continuing the program. USDA will hold future referenda at the direction of the Secretary or upon the request of at least 10 percent of the affected dairy farmers.

The Dairy Board portion of the revenue from the 15-cent per hundredweight producer assessment was $84.7 million for 2000. Qualified Programs revenue from the producer assessment was $169 million for 2000. Of the total monies collected by the Qualified Programs, 68 percent was used for advertising and promotion, and 21 percent was used for nutrition education and public and industry communications. The remaining funds were used for market, nutrition, and product research, as well as for export enhancement and general and administrative expenses. Revenue from assessments for the Dairy Board and many of

the Qualified Programs is integrated through a joint process of planning and program implementation so that the programs on the national, regional, State, and local level work together.

FLUID MILK PROCESSOR PROMOTION PROGRAM

The Fluid Milk Promotion Act of 1990 (Fluid Milk Act) (7 U.S.C. 6401 *et seq.*) authorized the establishment of a national processor program for fluid milk promotion and education. The Fluid Milk Order became effective December 10, 1993. The Secretary appointed the initial National Fluid Milk Processor Promotion Board (Fluid Milk Board) on June 6, 1994. The fluid Milk Order has an expiration date of December 31, 2002.

Processors administer this program through the Fluid Milk Board. Processors marketing more than 500,000 pounds of fluid milk per month fund this program through a 20-cent per hundredweight assessment on fluid milk processed and marketed in consumer-type packages in the contiguous 48 States and the District of Columbia.

The Fluid Milk Board's revenue for the January 1 through December 31, 2000, period was $109 million. Approximately 64 percent of program expenditures was used for fluid milk advertising, 14 percent for promotions, and about 10 percent for public relations. The remaining funds were used for research and general and administrative expenses.

The Fluid Milk Act required the Secretary to conduct a referendum among fluid milk processors to determine if a majority favored implementing the program. In the October 1993 referendum, 72 percent of the processors voted to approve the implementation of the fluid milk program. These processors represented 77

percent of the volume of fluid milk products marketed by all processors during May 1993, the representative period set for the referendum. USDA held a continuation referendum in February-March 1996. Of the processors voting in that referendum, nearly 65 percent favored continuation of the program. These processors represented 71 percent of the volume of fluid milk products marketed by all processors during September 1995, the representative period set for the referendum. In November 1998, USDA held a continuation referendum at the request of the Fluid Milk Board. Fluid milk processors voted to continue a national program for fluid milk promotion established by the Fluid Milk Order. Of the processors voting in this referendum 54 percent favored continuation of the order. These processors represented 86 percent of fluid milk products processed and marketed by fluid milk processors voting in the referendum. The Fluid Milk Act and Order state that USDA will hold future referenda upon the request of the Fluid Milk Board, processors representing 10 percent or more of the volume of fluid milk products marketed by those processors voting in the last referendum, or when called by the Secretary.

NATIONAL INTEGRATED FLUID MILK PROGRAM

Dairy Management Inc. (DMI), the staffing organization for the Dairy Board, and the Fluid Milk Board completed the integration of their fluid milk programs in January 1999, and this continued in 2000. The integration plan has enabled the Fluid Milk Board to fulfill the promotion program coordination requirements of the Fluid Milk Act. The funding level of the integrated program totaled approximately $180 million in 2000, with about $86.5 million from DMI and State and regional organizations and about

$94.1 million from the Fluid Milk Board. The integrated plan, which includes both planning and implementation, continues to be research-based, message-focused, and jointly managed.

A summary of the national integrated fluid milk program for fiscal year 2000 follows the Fluid Milk Board section in Chapter 1 of this report.

USDA OVERSIGHT AND INDEPENDENT ANALYSIS

USDA has oversight responsibility for both dairy promotion programs. The oversight objectives ensure that the Boards and the Qualified Programs properly account for all program funds and that they administer the programs in accordance with their respective Acts and Orders. USDA also has responsibility for an independent evaluation of the programs. The Boards reimburse the Secretary, as required by the Acts, for USDA's administrative costs of program oversight and for the independent analysis.

Chapter 1 of this Report describes the activities of the Dairy Board, Qualified Programs, and the Fluid Milk Board. Chapter 2 reviews the oversight activities of USDA. Chapter 3 reports the results of the independent analysis of the effectiveness of the programs conducted by Cornell University. Chapter 4 includes an updated review of the beverage marketing environment by the Beverage Marketing Corporation of New York.

CHAPTER 1

THE DAIRY PROMOTION PROGRAMS

In 2000, the National Dairy Promotion and Research Board (Dairy Board) and the National Fluid Milk Processor Promotion Board (Fluid Milk Board) developed and implemented programs to expand the human consumption of fluid milk and dairy products. While each promotion program has many unique activities, the two programs integrated their fluid milk programs beginning in 1999 and continued the integrated program in 2000.

National Dairy Promotion and Research Board

The mission of the Dairy Board is to coordinate a promotion and research program that expands domestic and foreign markets for fluid milk and dairy products produced in the United States. The Dairy Board is responsible for administering the Dairy Promotion and Research Order (Dairy Order), developing plans and programs, and approving budgets. Its dairy farmer board of directors administers these plans and monitors the results of the programs.

The Secretary of Agriculture (Secretary) appoints 36 dairy farmers to administer the Dairy Order. The Secretary makes the appointments from nominations submitted by producer organizations, general farm organizations, qualified State or regional dairy product promotion, research, or nutrition education programs (Qualified Programs), and by other means as determined by the Secretary (7 CFR 1150.133(a)). Dairy Board members serve 3-year terms and represent one of 13 regions in the contiguous 48 States. Dairy Board members elect four officers: Chair, Vice-Chair, Treasurer, and Secretary.

Current Dairy Board members are in **Appendix A-1**. A map of the Dairy Board's regions is in **Appendix B-1**.

Total Dairy Board actual revenue for 2000 was $85.3 million (includes assessments and interest). This amount was higher than the Dairy Board budget of $82.6 million for that period. The Dairy Board revised budget for 2001 projects total revenue of $84.7 million from assessments and interest. The Dairy Board administrative budget continued to be within the 5-percent-of-revenue limitation required by the Dairy Order. The actual income and expenses for 1998-2000 are in **Appendix C-1**. USDA's oversight and evaluation expenses for 1996-2000 are in **Appendix C-2**. **Appendix C-3** displays the Dairy Board's approved budgets and a comparison of program funding by function for 1999-2001. An independent auditor's report for 2000 is in **Appendix D-1**.

The Dairy Board has two standing committees, the Finance and Administration (F&A) Committee and the Executive Committee. The F&A Committee is made up of the Dairy Board officers and appointments by the Dairy Board Chair. The Dairy Board Treasurer is the Chair of the F&A Committee, and the committee elects a Vice-Chair. The full Dairy Board serves as the Executive Committee. The remaining committees for the Dairy Board are joint program committees and are described as follows:

In March 1994, the Dairy Board approved the creation of Dairy Management Inc.™ (DMI). DMI is a joint undertaking between the Dairy Board and the United Dairy Industry Association (UDIA). UDIA is a federation of 18 of the 62 active Qualified Programs under the direction of a board of directors. DMI merged the staffs of the Dairy

Board and UDIA to manage the Dairy Board programs as well as the American Dairy Association® and National Dairy Council® throughout the contiguous 48 States. DMI is a merger of the two separate program and administrative staffs into a single staff that serves both boards, and is structured into support groups. The domestic marketing group supports advertising, school marketing, nutrition and product research, product publicity, and promotion activities. The industry relations/communications group provides outlets for news about dairy through its media contacts as well as communication regarding the dairy checkoff program to producers and the rest of the dairy industry. The research, planning, and evaluation group provides analysis of domestic and foreign marketplaces, program effectiveness, consumption patterns, and consumer perceptions for effective program planning, implementation, and measurement. The export group serves as a resource for U.S. dairy exporters to improve export capabilities of U.S. dairy companies.

Since January 1, 1995, the Dairy Board and UDIA have developed their marketing plans and programs through DMI. DMI facilitates the integration of producer promotion funds through a joint process of planning and program implementation so that the programs on the national, regional, State, and local level work together. The goals of DMI are to reduce administrative costs, to have a larger impact on the consumer, and to be better able to drive demand and help increase human consumption of fluid milk and dairy products.

DMI funds 1- to 3-year research projects that support marketing efforts. Six Dairy Foods Research Centers and two Nutrition Institutes provide much of the research. Their location and the research objectives are listed in

Appendix F-1. Additionally, lists of DMI's dairy foods and nutrition projects are contained in **Appendices F-2** and **F-3**, respectively. Universities and other industry researchers throughout the U.S. compete for these research contracts.

In 2000, the DMI Board consisted of 12 dairy farmers from the Dairy Board and 12 dairy farmers from the UDIA Board. The Dairy Board officers are automatically appointed to the DMI Board, and the Dairy Board Chair appoints the remaining Dairy Board representatives to the DMI Board. An amendment to the articles of incorporation of DMI to expand the DMI Board size beginning in January 2001 was passed by both boards in August 2000. The expanded DMI Board is comprised of all Dairy Board and all UDIA Board members. The initial DMI Board structure – whereby a smaller group oversaw the Dairy Board/UDIA relationship – is no longer necessary.

The committees for program activities are comprised of board members from both the Dairy Board and UDIA Boards. The Dairy Board and UDIA Boards separately must approve the DMI budget and annual plan before they can be implemented. In 1997, a three-year domestic and export marketing plan was developed and approved separately by these joint Boards (for implementation in 1998, 1999, and 2000). In October 2000, both boards approved a 2001 unified dairy promotion plan budget and national implementation programs. Earlier in 2000, DMI held a series of dairy director regional planning forums across the country to review and to develop marketing strategies for a unified dairy promotion plan. These forums were designed to create one unified dairy promotion plan and allow opportunity for State and regional dairy board members to ask questions, raise concerns, and

offer their thinking on the direction and development of a unified dairy promotion plan. The 2001 unified dairy promotion plan is designed to spend money where consumers are – not where dairy cows are. The plan will be consistently implemented in demand-building consumer markets nationwide. In addition to funding from the Dairy Board, the unified dairy promotion plan will leverage resources from State and regional organizations, the Fluid Milk Board, the U.S. Dairy Export Council, and UDIA. These organizations will turn their attention to developing a new five-year strategic direction for the unified dairy promotion plan in 2001.

The joint Dairy Board and UDIA Board committee structure provides the framework for DMI program activities. The Dairy Board and UDIA Board Chairs assign their respective board members to the following joint program committees: Cheese, Communications and Technology, Export and Nonfat Dry Milk and Whey, and Fluid Milk. Each committee elects a Chair and a Vice-Chair. The joint committees and the DMI staff are responsible for setting program priorities, planning activities and projects, and evaluating results. Two additional ad-hoc committees were added during 2000: the Joint Industry Partnering Committee and the Joint Evaluation Committee. The Dairy Board and UDIA Board review and approve all DMI activities. During 2000, the Dairy Board and UDIA Board met jointly six times.

Website www.dairyinfo.com provides up-to-date information about the dairy checkoff program and industry news. The website also provides links to other local, State, and regional promotion organizations and activities. The following information describes the activities for each program committee during 2000. **Appendix E-1** contains

the DMI and Dairy Board contracts for projects reviewed by USDA during 2000.

CHEESE

The DMI umbrella cheese campaign "Ahh the power of Cheese™" (formerly "Behold the power of Cheese™") continued to promote cheese directly toward "Cheese Lovers," with an emphasis on cheese "Cravers" and cheese "Enhancers." Cheese "Cravers" eat cheese primarily as-is directly out of the package or off the block and have cheese as an important component of their food consumption routine. Cheese "Enhancers" have equally positive attitudes toward cheese, but their consumption primarily takes the form of cheese as an ingredient in meal preparation. As in previous years, the DMI cheese advertising campaign continued to be recognized for creative excellence, winning numerous awards from national and international groups, **Table 1-1** contains a listing of DMI's 2000 cheese advertising executions.

TABLE 1-1 2000 Dairy Management Inc. Cheese Advertising

Television	Print
Election	Candidate
Mr. Giggles	Football
Hook	Hook
Clay Fishing	Pasta
Santa	Holiday
Moon	Peppers*
Mom	Chicken & Cheese*
	Artichoke*

SOURCE: Dairy Management Inc. (*Denotes Trade and Foodservice Print Advertising)

As in previous years, the cheese marketing effort included major retail co-marketing programs implemented in supermarkets representing more than 60% of U.S. retail grocery sales volume. In these efforts, DMI provides retailer-customized media (television, radio, or direct mail) and in-store sampling, which are combined with the retailer's own advertising and merchandising support to drive cheese sales. Research has consistently shown that these co-marketing programs contribute to increased cheese category volume for participating stores.

In foodservice, DMI continued to implement trade advertising and public relations campaigns to keep cheese top-of-mind with restaurant operators. The trade print advertising is listed in **Table 1-1**. DMI also worked closely with selected national restaurant chains, including Pizza Hut, Burger King, and Wendy's, to drive cheese volume and ensure that cheese was prominently displayed in menu items. For example, DMI teamed with Pizza Hut® menu developers to create several new cheese-friendly pizzas, including the "Insider" pizza, which used a 6-cheese blend (Parmesan, Romano, Mozzarella, Monterey Jack, Provolone, and Cheddar) on a medium pizza between two thin crusts, using one pound of cheese, which is double the usual amount. Pizza Hut® sold 20 million "Insider" pizzas during the 13-week promotion, using 21 million pounds of cheese. Also, DMI worked with Pizza Hut® to develop and feature the "Ultimate Cheese Pizza," which also combined six different types of cheese, using more than one pound of cheese. The "Insider" and "Ultimate Cheese Pizza" used a combined total of approximately 26 million pounds of cheese.

DMI also executed a comprehensive product publicity program for cheese in 2000. The cheese product publicity

leveraged the continued success of the "Ahh the power of Cheese™" advertising campaign. For the fifth consecutive year, DMI partnered with Mr. Food® and executed a new program called the "Mr. Food® Good Mornings with Cheese Recipe Contest." Mr. Food® demonstrated the grand-prize winning recipe on his nationally syndicated television show, which reached over 10 million viewers. Other cheese publicity highlights included "Savvy Snacking" and "America's Cheese Profile" programs. "Savvy Snacking" featured a half-page advertorial in *TV Guide* magazine and encouraged consumers to think cheese when they're craving a snack. "Savvy Snacking" also kicked off the "Big Cheese Snacking Contest," which asked consumers to submit a recipe inspired by their favorite television show. The winning recipe was featured in a later issue of *TV Guide*. "America's Cheese Profile" was designed to help consumers determine their ideal cheese by participating in an interactive online survey executed through the website www.ilovecheese.com. The website is sponsored by the American Dairy Association®, whose programs are managed by DMI. In addition to participating in programs such as "America's Cheese Profile," cheese lovers can use the website for cheese information such as recipes, a "Cheese Bytes" e-mail newsletter, and sections that feature famous chefs, recipes, and serving ideas.

Another program, the Cheese News Network (CNN), is a quarterly news bureau program designed to keep fresh ideas about cheese in the news. In February 2000, CNN leveraged "Love Affairs with Cheese," a media activity timed to coincide with Valentine's Day, and focused on romantic meals with cheese. In addition, a full-page advertorial complementing the "Love Affairs" program appeared in the February issue of *Redbook* magazine. The

advertorial featured a recipe for "Chicken, Provolone Cheese and Swiss Roulades with Pineapple Rice" and an essay contest asking consumers to answer the question: "What is the most romantic Cheese and why?"

DMI's product research activities for cheese during 2000 featured extensive investigations of manufacturing methodology, ripening, stability and physio-chemical rheology, and functional properties of cheese. Specific models for evaluating Cheddar, Swiss, Italian, and process cheeses were incorporated into several projects. Also, in December 2000, DMI sponsored the first-ever Cheese Forum, which brought together over 100 dairy research and business leaders for an intense two-day planning session that explored current cheese research projects and the cheese marketplace. The goal of the forum was to solicit industry input on what direction DMI's national research plan for cheese should take and what types of research need to be explored and funded in the future. The outcomes and suggestions received at the Forum will be used in DMI's 2001 research planning process.

In 1997, cheese consumption was 28.0 lbs./person. DMI set a 3-year cheese consumption goal of 30.5 lbs./person by the year 2000. The goal has been achieved, as per capita consumption in 2000 was 30.5 pounds.

COMMUNICATIONS AND TECHNOLOGY

Consumers receive mixed messages through the media about the nutritional value and benefits of food. DMI worked to provide consumers with education and information based on sound nutritional science and communicated the value of dairy products to consumers, as well as health professionals and educators.

DMI also worked to inform dairy farmers about how their assessment dollars were being used. DMI continued to use its system of communicating to dairy producers and other industry audiences through publications (such as the annual report, joint newsletters with State and regional dairy promotion groups, and dairy cooperative check stuffers), dairy industry events (including major trade shows and producer meetings), and media relations (including press releases, feature placements, and farm broadcast interviews). DMI continued its 3rd year of the "Dairy Ambassadors" program, a program which uses a select group of dairy farmers to further deliver consistent messages about the dairy promotion program to dairy producers and other industry audiences.

DMI continued its support for butter through cooperation and public relations activities with the American Butter Institute. The website www.butterisbest.com continues to be a resource center with current cooking trends and ideas, butter recipes, and links to other butter-related sites.

DMI's Chair, CEO, and board members participated in meetings with dairy cooperatives, industry associations, processors, and other groups throughout the country. The Dairy Board and the UDIA House of Delegates also agreed to continue having dairy director regional planning forums in 2001 and are planning to have a national dairy director forum, to bring together dairy farmers from all over the country to share ideas and thoughts about future dairy promotion activities.

Another activity of the Communications and Technology program was the issues management program. The objective of this program was to identify, monitor, and manage key issues that may influence consumers perceptions of dairy products. DMI coordinated its issues management activities with State and regional dairy promotion groups, as well as other dairy and agricultural groups. DMI worked with these groups to bring forth sound, science-based information to deal with consumer issues. Dairy Reputation Management, an industry-wide effort that interacts with the Issues Management, Industry Relations, and Dairy Image Programs, continued a proactive program to reinforce the positive attributes of dairy foods and dairy farmers in the minds of consumers.

Farmer-funded research continues to demonstrate that dairy products are a necessary food component in the diet of all people throughout the life cycle. Research continues to focus on colon cancer and other diseases that may see decreases in occurrence as a result of consuming dairy foods. Additionally, ongoing nutrition research is validating discoveries about the potential benefits of dairy food consumption in reducing obesity. Transfer of these research outcomes has enhanced the image of the healthfulness of dairy foods by many health profressional organizations, which continue to endorse the role of dairy foods in a healthy diet. Product research addresses safety and quality issues, continues to examine new milkfat-based ingredients, and provides technical support to the marketing of these ingredients.

EXPORT and NONFAT DRY MILK and WHEY

DMI's export enhancement program is implemented by the U.S. Dairy Export Council (USDEC). USDEC receives primary funding from three sources: DMI,

USDA's Foreign Agricultural Service (FAS), and membership dues from dairy cooperatives, exporters, and suppliers. In 2000, USDEC received $6.1 million from DMI; 2.1 million from USDA's Foreign Market Access Program and the Market Promotion Program that support commodity groups in promotion of their commodities in foreign markets; and $630 thousand from membership dues – with dues from an all-time high of 75 members. USDEC began its fifth year of operation in 2000.

USDEC currently has offices in Mexico City, Tokyo, Seoul, Hong Kong, Shanghai, Bangkok, and Sao Paulo. Activities in Mexico concentrated on whey, milk powders, ice cream, and cheese; in Japan and Korea, cheese and whey proteins and derivatives; in China, whey proteins and derivatives and skim milk powder; and in other Southeast Asian markets, skim milk powder and whey proteins and derivatives. The programs were carried out through supermarket and food service trade missions, retail sampling, quarterly trade newsletters, booths at trade fairs, and seminars about American dairy products presented to the press, end-users and food distributors.

USDEC continued working to improve the export capabilities of domestic dairy companies. Final 1999 statistics released in mid-2000, confirmed that U.S. dairy product exports broke the $1 billion ceiling for the first-time ever. U.S. exporters also topped last years whey and whey protein concentrate sales. Rising global demand for milk proteins in a variety of applications is helping to drive the growth. As a result of USDEC's Japan trade servicing programs, a major dairy company launched a new beverage during the summer of 2000 containing U.S. whey protein concentrate. Sales exceeded company expectations by 20% in the first selling season. Other successes include a leading Singapore bakery, which received

technical training from USDEC, joined a trade mission to the U.S. and, as a result, adopted U.S. whey for its line of premium baked goods. Without the assistance of USDEC, U.S. exporters would not have the opportunities or market available for these types of activities. For 2001, USDEC will continue to focus a significant portion of its market development programming toward the whey sector.

USDEC continued its maintenance of a comprehensive series of export reference manuals (now available on CD-ROM) that provide up-to-date information on market conditions, global regulations, and procedures for export. USDEC provided opportunities for domestic suppliers of dairy products to meet potential importers through reverse trade missions. Additionally, www.usdec.com provides information for the public as well as other information for its members.

Nonfat dry milk and whey efforts were delivered through advertising, public relations, trade shows, and the web site www.doitwithdairy.com. the advertising theme "Do it with Dairy®" was utilized throughout all activities. There are several newsletters and other quarterly publications that support this program. "Dairy Dimensions," a quarterly newsletter, focuses on developments in dairy technology research. The "Dairy Ingredients Insider," a newsletter where dairy ingredient suppliers are able to track buyers' attitudes, behaviors, buying patterns, and product development plans, has become a key planning tool for some suppliers. It is designed to enable suppliers to become more effective and valuable by utilizing and leveraging market research created by DMI.

"Ingredient Insights," designed expressly for food formulators and ingredient suppliers, provides news

about dairy ingredients and specific applications technical support resources. As a part of this program, DMI provides ingredient technical support systems for food technologists. The system features four tiers, enabling food technologists to request the level of support they find the most useful. The options range from requesting technical information via FAX-ON-DEMAND to direct dialogue with a researcher.

"Innovations in Dairy," a technical bulletin that details new dairy science and technology information and research, is executed through a series of authoritative, topical updates written from a practical perspective for the lay reader.

Research continues to focus on nonfat dry milk and whey in the areas of functionality, quality, packaging, and new applications. In addition, the application laboratory for nonfat dry milk at California Polytechnic State University and the whey application laboratory at the University of Wisconsin Center for Dairy Research continued to provide technical assistance to both those that produce the ingredients and those that use the ingredients in finished products. Also, website www.extraordinarydairy.com provides a network of resources and information to help the dairy and food industries bring innovative products, formulations, and processes to market.

Information on integrated fluid milk advertising, promotions, public relations, school marketing, strategic thinking, and other activities that include DMI, State and regional organizations, and the Fluid Milk Board, is detailed in the national fluid milk integrated program summary in this chapter.

Qualified State or Regional Dairy Product Promotion, Research, or Nutrition Education Programs

Qualified Programs are certified annually by the Secretary. To receive certification, the Qualified Program must: (1) conduct activities that are intended to increase human consumption of milk and dairy products generally; (2) have been active and ongoing before passage of the Dairy Act, except for programs operated under the laws of the United States or any State; (3) be primarily financed by producers, either individually or through cooperative associations; (4) not use a private brand or trade name in its advertising and promotion of dairy products (unless approved by the Dairy Board and USDA); and (5) not use program funds for the purpose of influencing governmental policy or action (7 CFR 1150.153). A list of the 62 active programs is provided in **Appendix G**.

The aggregate revenue from the producers' 15-cent per hundredweight assessment directed to the Qualified Programs in 2000 was $169 million (approximately 10 cents out of the 15 cents assessment). The Qualified Programs manage State or regional dairy product promotion, research, or nutrition education programs (**Tables 1-2 and 1-3**).

Some of these Qualified Programs participate in cooperative efforts conducted and coordinated by other Qualified Programs and/or other organizations such as DMI, the Dairy Board, and UDIA. Their goal in combining funding and coordinating projects is a more effective and efficient management of producers' promotion dollars through larger, broad-based projects. For example, UDIA coordinates nationally through DMI, programs and resources for 18 federation members and their affiliated units.

TABLE 1-2 Aggregate Income and Expenditure Data Reported by the 62 Active Qualified Programs to USDA

	1999 (in $000's)		2000 (in $000's)	
INCOME				
Carryover from Previous Years	42,591[1]		50,085[1]	
Producer Remittances	163,228		169,996	
Payments Transferred from Other Qualified Programs[2]	54,415		52,402	
Payments Transferred to Other Qualified Programs[2]	(55,109)		(53,457)	
Other[3]	4,635		5,991	
Total Adjusted Annual Income	209,760		225,017	
EXPENDITURES				
General & Administrative	7,695	[4.8%]	7,375	[4.3%]
Advertising & Sales Promotion	107,575	[66.8%]	117,040	[69.0%]
Dairy Foods & Nutrition Research	5,137	[3.1%]	5,849	[3.4%]
Public & Industry Communications	12,876	[8.0%]	13,691	[8.1%]
Nutrition Education	23,363	[14.2%]	22,619	[13.3%]
Market & Economic Research	1,725	[1.1%]	1,787	[1.1%]
Other[4]	2,790	[1.7%]	1,293	[0.8%]
Total Annual Expenditures	161,161	[100%]	169,654	[100%]
Total Available for Future Year Programs	48,599[1]		55,363	

[1] Differences are due to audit adjustments and varying accounting periods.

[2] Payments transferred between Qualified Programs differ due to different accounting methods and accounting periods.

[3] Includes interest, income from processors and handlers, sales of supplies and materials, contributions, and rental income.

[4] Includes capital expenses and contributions to universities and other organizations.

SOURCE: Aggregate income and expenditure data reported by the 62 active Qualified Programs to USDA.

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TABLE 1-3 Aggregate Advertising Expenditures Data Reported by the 62 Active Qualified Programs to USDA

	1999 (in $000's)		2000 (in $000's)	
ADVERTISING PROGRAMS				
Fluid Milk	49,371	[45.9%]	50,195	[42.9%]
Cheese	50,964	[47.4%]	58,865	[50.3%]
Butter	133	[0.1%]	217	[0.2%]
Frozen Dairy Products	138	[0.1%]	748	[0.6%]
Other[1]	6,969	[6.5%]	7,015	[6.0%]
Total	107,575	[100%]	117,040	[100%]

[1] Includes "Real Seal," holiday, multi-product, calcium, evaporated milk, food service, product donations at State fairs and other events, and contributions for displays or promotional events.

SOURCE: Aggregate income and expenditure data reported by the 62 active Qualified Programs to USDA.

National Fluid Milk Processor Promotion Board

The Fluid Milk Board, as authorized in the Fluid Milk Promotion Act of 1990 (Fluid Milk Act), administers a fluid milk promotion and consumer education program that is funded by fluid milk processors. The program is designed to educate Americans about the benefits of milk, increase fluid milk consumption, and maintain and expand markets and uses for fluid milk products in the contiguous 48 States and the District of Columbia.

The Secretary of Agriculture appoints 20 members to the Fluid Milk Board. Fifteen members are fluid milk processors who each represent a separate geographical region, and five are at-large members. Of the five at-large members, at least three must be fluid milk processors and at least one must be from the general public. Three fluid milk processors and two public members serve as at-large members on the current Fluid Milk Board. The members of the Fluid Milk Board serve 3-year terms and are eligible to be appointed to two consecutive terms. Current Fluid Milk Board members are listed in **Appendix A-2**. A map of the Fluid Milk Board regions is shown in **Appendix B-2**.

The Fluid Milk Board elects four officers: Chair, Vice-Chair, Secretary, and Treasurer. Fluid Milk Board members are assigned by the Chair to the following committees: Advertising, Finance, Promotions, Public Relations/ Medical and Scientific, and Strategic Thinking. The program committees are responsible for setting program priorities, planning activities and projects, and evaluating results. The Finance Committee reviews all program authorization requests for funding sufficiency, the Fluid Milk Board's independent financial audit, and the work of

the Board's accounting firm. The Fluid Milk Board met four times during its 2000 fiscal year.

The Fluid Milk Program is funded by a 20-cent per hundredweight assessment on fluid milk products processed and marketed commercially in consumer-type packages in the contiguous 48 States and the District of Columbia. The program exempts from assessment those processors who process and market 500,000 pounds or less of fluid milk products each month. Assessment generated $109 million in 2000. The Fluid Milk Order requires the Fluid Milk Board to return 80 percent of the funds received from California processors to the California fluid milk processor promotion program. For 2000, the amount returned to California from the assessments was approximately $10 million. The California fluid milk processor promotion program uses the funds to continue its promotion activities, which include the got milk?® advertising campaign.

The actual income and expenses for 1996-2000 are in **Appendix C-4**. The Fluid Milk Board's administrative expenses continued to be within the 5-percent-of-assessments limitation required by the Fluid Milk Order. USDA's oversight and evaluation expenses for 1996-2000 are in **Appendix C-5. Appendix C-6** contains the Fluid Milk Board's approved budgets for 1997-2001. **Appendix D-2** contains an independent auditor's reports for the period of January 1, 2000, through December 31, 2000.

The following summarizes Fluid Milk Board medical and scientific activities for the period of January 1, 2000, through December 31, 2000. The Fluid Milk Board's advertising, promotions, public relations, school marketing, and strategic thinking activities are incorporated in the National Fluid Milk Integrated Program summary.

MEDICAL AND SCIENTIFIC

The Fluid Milk Board has established a Medical Advisory Board (MAB) comprised of academic, medical, and healthcare professionals with expertise relevant to the health benefits of fluid milk. The MAB provided guidance to the Fluid Milk Board's development of key nutritional and health messages for consumers and health professionals. The MAB also reviewed nutrition and health messages for accuracy. The MAB members assisted the Fluid Milk Board in forging relationships with health organizations such as the American Heart Association, the National Osteoporosis Foundation, the American Dietetic Association, American Academy of Pediatrics, and the National Medical Association. They also appeared as medical professionals in the media, providing science-based statements supporting the health benefits of milk.

The medical and scientific activities of the Fluid Milk Board also included preparing press materials and acting as spokespersons on breaking research with relevance to fluid milk. The Fluid Milk Board created consumer and health professional materials to explain this research. The Dietary Approaches to Stop Hypertension (DASH) diet continues to be a major focus of activity. Research on the DASH diet shows that by eating a diet rich in nonfat or lowfat dairy products and fruits and vegetables many people can reduce their blood pressure with or without medication. In addition to the "Reduce Your Risk" and "The Diet-Blood Pressure Connection" brochures and press materials about DASH diets, the Fluid Milk Board implemented new initiatives on high blood pressure and lactose intolerance.

The Fluid Milk Board developed a program which spotlights the high incidence of high blood pressure among African Americans and promotes milk and milk products as a dietary solution as part of the DASH diet. The program also addresses misconceptions about lactose intolerance and shows why it should not be a barrier to including milk in the diet. In addition, the Board launched a lactose intolerance initiative that focuses on educating African Americans on the importance of incorporating milk into their diet. The programs provided educational material on osteoporosis and lactose intolerance.

The Fluid Milk Board also created several educational brochures such as "Shake Up Your Shape Up Plan," "Calcium for 2," "Milk The Power Play," and "Choc It Up." The brochures targeted specific audiences and included nutritional facts and messages about milk to encourage persons to keep milk as part of their diet.

National Fluid Milk Integrated Program

The Fluid Milk Board and DMI continued to implement during 2000 an integrated fluid milk marketing plan which is research-based, message-focused, and jointly managed. This integrated marketing effort began in 1998 and the transition to total integration was successfully completed in January 1999. The 2000 funding level totaled approximately $180 million, with $86.5 from DMI and State and regional organizations and about $94.1 million from the Fluid Milk Board.

The purpose of the integrated program is to positively change the attitudes and purchase behavior of the country regarding fluid milk. Many communication avenues were used to accomplish this objective, including television and print advertising, public relations, promotions, and others. The program's target audience includes: kids 6-11; teen girls and boys 12-17; college men and women 18-21; women 18-49; men 18-34; moms 18-34; and minorities (Hispanics and African Americans).

In 2000, the Fluid Milk Board continued the Milk Mustache/got milk?® advertising campaign. The campaign provides the basis for advertising activities and other program delivery methods. The got milk?® tagline and the Milk Mustache campaign were successfully merged in 1999.

A description follows of the 2000 integrated program activities for the Fluid Milk Board and DMI.

ADVERTISING

The Fluid Milk Board and DMI launched their first integrated television advertisements in October 1999. The commercials included "Milk Carton Guy" and "Old Guys," which were targeted to the teen and adult audiences, and "Super Mario," which featured a popular video game character and was developed for the kid audience. The commercials continued to air throughout 2000. These commercials and the subsequent television advertisements developed in 2000 as part of the integrated effort highlight specific, relevant, health-benefit messages about milk and its nutrient package.

In 2000, the Fluid Milk Board and DMI television expenditures totaled $57.5 million. The integrated television marketing effort was increased to include 52 weeks of national television for kids, and for adults, 30 weeks of national television, 20 weeks of cable television, and 10 weeks of prime television. New commercials developed and launched during 2000 were "Super Heroes," which targeted both the adult and kid audiences with health-benefit messages, and "Fame Game," which supported the first-ever national on-pack (cap) promotion. In addition to these commercials, several other creativity concepts were developed and tested. **Table 1-4** provides a complete listing by target audience of the 2000 fluid milk television advertising. Total television advertising expenditures on each target audience were as follows: adult – $34.7 million and kids – $22.8 million.

TABLE 1-4 2000 Fluid Milk Television Advertising

Kids Television	Adult Television	Hispanic Television
Super Mario	Santa	New Mother*
Milk Carton Guy – Basketball	Milk Carton Guy – Basketball	I Don't Know (Nese)*
Super Heroes	Old Guys	Generation 5*
	Fame Game – Fan	Memories 1*
	Fame Game – Little Girl	Memories 2*
	Super Heroes	Telephone TV*

SOURCE: Dairy Management Inc., and the Fluid Milk Board. (*Indicates advertising developed by California and used by State and Regional Organizations.)

In addition to television media, the integrated program completed a full year of fluid milk print advertising through

the Milk Mustache/got milk?® campaign. The campaign used celebrity advertising in over 100 magazines, outdoor billboards, and other print vehicles to address messages on osteoporosis, growth, active/energy, bone health, and other important nutrition benefits. The Fluid Milk Act and Fluid Milk Order state that the advertising coverage in each of the Board's regions is to be proportionate to funds collected from each respective region. The integrated program used outdoor billboards and regional magazines to fulfill this requirement. **Table 1-5** contains a complete listing of the 2000 fluid milk print advertisements.

The integrated program also continued "Moment ads" that work around special events and create an awareness of milk. Such ads included "Super Bowl," "Survivor," and a "2000 Olympics" winner ad.

The integrated program also was able to generate media-driven promotions from the magazines that are used to extend the campaign. These promotions were created to add a consumption-driven element to the advertising program. Some successful promotions included the "Mad About Milk" contest in *Seventeen Magazine*, Milk and Fox Family "Show and Tell" sweepstakes in *USA Today* and on the Fox Family Channel, "Milk Mustache Posters" contest in *TV Guide*, and the "Scholar Athlete Milk Mustache of the Year" (SAMMY) Award. The SAMMY winners appeared in a milk mustache ad in *USA Today, Sports Illustrated*, and *ESPN The Magazine*.

TABLE 1-5 2000 Fluid Milk Print Advertising

Celebrity	Target	Theme
Super Bowl	Men/Women	Active
Britney Spears	Teens/Men/Women	Growth
Coaches (Joe Torres, Jeff Fisher, Pat Riley)	Men/Kids/Moms/Women	Active
Dixie Chicks	Moms/Women/Men	Strong Bones
Elton John	Women/Men	Osteoporosis/
	Women/Moms/Kids/Men/	Strong Bones
Jackie Chan	Teens	Strong Bones
Kurt Warner	Moms/Men	Active
Fankie Muniz	Women/Moms	Active/ Strong Bones
Marc Antony	Moms/Teens/Men/Women	Osteoporosis/ Strong Bones
Noah Wyle	Women/Moms/Men	Strong Bones
Pikachu	Kids/Moms	Growth
Rugrats	Teens/Kids/Moms/Women	Strong Bones
Rulon Gardner	Women/Moms/Men	Active
Sela Ward	Women/Moms/Men	Strong Bones/ Osteoporosis
Survivor	Men/Women/Moms	Active
Batman	Kids/Teens	Growth
Blue's Clues	Moms/Kids	Chocolate Milk
David Boreanaz	Women/Men/Moms/Teens	Osteoporosis
Everybody Loves Raymond	Women/Men/Moms	Osteoporosis
Super Mario	Teens/Moms/Kids	Growth/ Strong Bones
Pete Sampras	Men	Active
Rebecca Romijn-Stamos	Men	Osteoporosis
Superman	Kids/Teens	Strong Bones
Carson Daly	Teen Girls	Growth

Venus & Serena Williams	Men/Women	Active
Alex Trebek	Moms	Osteoporosis
Austin Powers	Teens	Active
Backstreet Boys	Teens	Osteoporosis
Curley	Men	Osteoporosis
Hulk	Teens/Kids	Active
Jeff Gordon	Men	Active
Jennifer Love Hewitt	Teens	Osteoporosis
Kermit	Men	Calcium
Mark McGuire	Men/Teens/Women	Active
Mia Hamm	Teens/Kids/Men/Women	Active
Patrick Ewing	Men/Teens	Active
Spiderman	Kids	Strong Bones
Stone Cold Steve Austin	Men	Active
Tony Hawk	Teens	Active
Tracy Ullman	Moms/Women	Osteoporosis
Whoopi Goldberg	Moms/Women	Lactose Intolerance
WNBA (Lisa Leslie, Nikki McCray, and Sheryl Swoopes)	Men/Women	Active

SOURCE: Fluid Milk Board.

PROMOTIONS

The Fluid Milk Board and DMI conduct promotions to increase fluid milk sales in retail outlets. The promotions work to move more milk out of the refrigerator of grocery stores, and to increase sales in other retail outlets such as convenience stores, independent grocery stores, and mass merchandisers. Some of the promotions work with partners to increase the appeal of the program when appropriate. After carefully measuring the results of the numerous promotion

strategies, promotion activity is now focused in areas that assure success which include feature incentives to increase advertisements and displays of milk, and on-pack (cap) programs offering prizes directly to consumers.

During 2000, the Fluid Milk Board and DMI conducted three national promotions. "Chocolate: The Wilder Side of Milk" promotion was a milestone in milk promotion history. The promotion was the milk industry's first-ever national chocolate milk promotion designed to increase chocolate milk sales through feature advertisements and dairy aisle displays of chocolate milk. Nearly 2,400 retailers participated in the promotion, which resulted in an unprecedented level of participation by independent grocery accounts. In addition to the high participation level, sales of chocolate milk increased by about 24% during the six-week promotional period. The net incremental volume was estimated to be 1.1 million gallons.

The "Milk Mustache Fame Game" was the first-ever national on-pack (cap) promotion for the dairy industry. Retail participation for this event surpassed levels of previous promotions. The promotion featured more than 200 million game pieces on white milk gallons and provided consumers a chance to win more than two million prizes including a grand prize of living as a milk mustache celebrity for a year. Additionally, a back-to-school fall promotion, featuring a popular teen music star, was designed to promote both white milk gallons and chocolate milk. The promotion targeted teens with the opportunity to win locker posters, discounts on merchandise, and a chance to win a day with a teen superstar.

The Fluid Milk Board and DMI worked with State and regional organizations to get their promotions extended at the local level. Processors and Qualified Programs obtain the Fluid Milk Board's promotional, advertising, and public relations materials from the Processor Hotline at 1-800-945-MILK (6455).

PUBLIC RELATIONS

The public relations programs continued to focus on the nutritional benefits of milk, emerging scientific studies which highlight milk's benefits, and preparing for and responding to misconceptions and negative news about milk or the educational campaign. A wide variety of initiatives were implemented to reach specific target audiences. During 2000, over two billion media impressions were garnered through the integrated public relations program. The program provided support for the three national promotions to build awareness and increase participation. The "Choc It Up" program, which supported the spring chocolate milk promotion, highlighted the calcium crisis among kids and encouraged moms to serve chocolate milk to their children by educating them about the health benefits associated with drinking chocolate milk.

The Fluid Milk Board and DMI's "Crash Course on Calcium" curriculum provided high school teachers with a video, poster, and teaching guide that helped to show the importance of calcium consumption through milk to prevent the possible onset of osteoporosis and stress fractures. The "Milk: Get Fit With It" program also educated teen athletes about milk's complete nutrient package, the role it plays in an active life

style, and why calcium is critical for growing bones.

The Milk Mustache Mobile "Get Moo-ving With Milk" tour partnered with the Council for Physical Fitness to educate Americans about the valuable combination of physical activity and drinking milk. The 126-city tour provided an interactive sports cage and fitness assessments to determine strength, flexibility, and body composition. Additionally, fitness experts assisted registered dietitians in conducting health consultations with consumers and offering nutrition and fitness advice.

Through a partnership with the National Institute of Child Health and Human Development, a "Pediatrician Calcium Check-Up/Get Up and Grow" program was implemented to encourage pediatricians, family physicians, and registered dieticians to promote increased calcium intake and the nutritional benefits of milk. Educational materials were developed for distribution to parents to help them encourage their children to drink milk for proper growth and development.

The Fluid Milk Board and DMI also launched a new lactose intolerance initiative with emphasis on minority outreach to offer simple ways for consumers to include milk and dairy products in their diets.

Brochures and other information on milk were made available to consumers through the website www.whymilk.com.

STRATEGIC THINKING

The Fluid Milk Strategic Thinking Initiative (FMSTI) is a joint effort of the Fluid Milk Board, DMI, the Milk Industry Foundation, processors, and suppliers. This ongoing effort was established to address barriers to fluid milk consumption not targeted by the advertising, promotion, and public relations activities of the Fluid Milk Board and DMI. In 1998, the Task Force began a series of research projects on how to improve fluid milk sales in five priority areas including vending, home-meal replacement, nutraceuticals, convenience stores, and food service. The FMSTI is focusing on increasing and expanding the availability of milk in these marketing channels. The results of research released during 2000 are discussed below.

Initial vending research identified opportunities for increased milk sales through vending machines. Based on this research, the task force conducted a 3-month test which placed a total of 45 vending machines in six markets. The dedicated milk machines and the combination milk and sweet snack machines were placed in airports, offices, industrial plants, hospitals, schools, and universities. The results of the research will allow milk companies to further refine their efforts in the vending marketing channel which currently represents only 1.4% of total food vending sales.

The Fluid Milk Board and DMI also partnered with Maytag Commercial Solutions to place 100 milk vending machines in middle and high schools in five markets across the United States. The test is designed to measure the velocity of sales to determine the demand, sales, and profit

potential of vending machines when placed in schools. Results will be available in 2001.

The FMSTI Convenience Store Task Force also identified growth opportunities with convenience stores. A case study revealed that single-serve milk and milk-gallon products currently receive a disproportionately low share of cooler space in convenience stores. Among single-serve non alcoholic beverages, milk receives only 5% cooler space despite an above average return on inventory invested. Consequently, FMSTI was instrumental in working with one of the largest operators of company controlled convenience stores in the United States to have milk designated as a strategic product for the grocery category.

The FMSTI also released a report which identified possible functional-food opportunities that exist for fluid milk products. Results from this research can be used to assist processors in developing fluid-milk based nutraceutical products.

FMSTI continues to examine marketing barriers and to offer ideas for increasing milk sales in other areas such as foodservice, home-meal replacement, and other growth opportunities.

SCHOOL MARKETING

The National Dairy Council® (www.nationaldairy council.org), whose programs are managed by DMI and the Fluid Milk Board, works with school foodservice professionals and teachers to raise student awareness of the importance of having milk and dairy products as a part of a healthy lifestyle. The integrated milk program was extended into schools through school foodservice

professionals using posters and other tie-in promotions. Reaching kids through the classroom with various programs was the focus of nutrition education efforts. "Chef Combo's Fantastic Adventures" was placed in 80% of pre-school kindergarten sites nationally. "Pyramid Café®" and "Pyramid Explorations™," targeted to second and fourth grades, has reached over 10.6 million with milk and dairy health messages. A survey showed a utilization rate of over 70% of the instructors that have the programs.

Another popular school foodservice program in 2000 was the got milk?® get S.M.A.R.T. program. The program's goal is to increase milk sales in the top 3,000 school districts. Schools receive points for increased main line milk sales and for offering a-la-carte fluid milk products during breakfast and lunch periods to help increase overall sales and usage of single-serve milk products in plastic containers. The points can be redeemed for milk coolers and other customized foodservice equipment.

Effective July 1, 2000, www.familyfoodzone.com is now linked to www.nutritionexplorations.org and the newly combined site features information for teachers and consumers. The site includes lesson plans for educators, resources for school foodservice directors, ideas for smart eating for families, and fun activities for kids. In addition, the Family Food Zone section of the site recently won a Silver Award in the Education Division of Health Promotion and Injury Prevention from the World Wide Web Health Awards.

OTHER RESEARCH

In June 2000, DMI sponsored the first-ever Fluid Milk Research Forum. The purpose of the forum was to bring together dairy researchers and business leaders for an update on current fluid-milk research and obtain critical feedback and input for future research priorities. At the forum, DMI was able to get significant input on what types of fluid-milk research need to be explored and funded in 2001. Suggested areas of research included probiotics, nutraceuticals, extended shelf-life, and several others.

2000 milk-related nutrition and product research was conducted in the following areas:

1. The role of milk and milk products in the prevention of colon cancer and reduction of blood pressure.
2. Establishing the genetic basis for the activity of probiotic cultures.
3. Demonstration of milk consumption by teens to meet their calcium needs without adversely affecting weight.
4. The role of milk and calcium in the diet of kids and moms.
5. Technology for the development of milk-based products as carriers of probiotics and nutraceuticals.

CHAPTER 2

UNITED STATES DEPARTMENT OF AGRICULTURE

Dairy Programs of the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) has the day-to-day oversight responsibilities for the National

Dairy Promotion and Research Board (Dairy Board) and the National Fluid Milk Processor Promotion Board (Fluid Milk Board). Dairy Programs oversight activities include reviewing and approving the Dairy and Fluid Milk Boards' budgets and budget amendments, contracts, advertising campaigns, and investment plans. Approval of program materials is also a responsibility of USDA. Program materials are monitored for conformance with their respective Acts and Orders and with other legislation such as the Nutrition Labeling and Education Act.

Dairy Programs continues to insure that the collection, accounting, auditing, and expenditure of generic promotion funds is consistent with the enabling legislation and orders; to qualify State or regional dairy product promotion, research or nutrition education programs (Qualified Programs); and to provide for evaluation of the effectiveness of both programs' advertising campaigns. USDA also assists the Boards in their assessment collection, compliance, and enforcement actions. Other USDA responsibilities relate to the nominating and appointing of Board members, amending the orders, conducting referenda, and conducting periodic program audits. USDA representatives attend full Board and Board committee meetings.

During November 1998, USDA formed a Task Force on Research and Promotion Boards to review oversight and operations of all agricultural commodity research and promotion boards. In December 1999, the Secretary endorsed the recommendations of the Task Force and invited interested persons to submit comments on the proposed guidelines for changes in oversight procedures for promotion and research programs by June 30, 2000. The Department has not yet issued final changes to its guidelines for oversight of promotion and research programs.

National Dairy Promotion and Research Board Oversight

NOMINATIONS AND APPOINTMENTS

The 36 members of the Dairy Board who administer the program serve 3-year terms, with no member serving more than two consecutive terms. Dairy Board members are selected by the Secretary of Agriculture from nominations submitted by producer organizations, general farm organizations representing other producers, Qualified Programs, or other sources.

Forty-five nominations were received by USDA for the 12 Dairy Board members whose terms expired October 31, 1999. A press release issued on November 2, 1999, announced the appointment of seven new members and five incumbents for 3-year terms ending October 31, 2002. Newly appointed members were: John Zonneveld, Jr., Laton, California (Region 2); John B. Stacks, Damacus, Arkansas (Region 4); Patricia M. Boettcher, Bloomer, Wisconsin (Region 6); Janet M. Nelson, Prairie Farm, Wisconsin (Region 6); Joseph P. Logan, Kinsman, Ohio (Region 9); Rita Kennedy, Valencia, Pennsylvania (Region 11); and Claude J. Bourbeau, Swanton, Vermont (Region 13). Re-appointed to serve second terms were: Paul E. Rovey, Glendale, Arizona (Region 3); Glen E. Schroeder, Caledonia, Minnesota (Region 5); William B. Siebenborn, Trenton, Missouri (Region 7); James S. Cook, Evergreen, Alabama (Region 8); and Ruth I. Laribee, Lowville, New York (Region 12).

In addition, forty-two nominations were received by USDA for the 12 Dairy Board members whose terms expired October 31, 2000. A press release issued on October 2, 2000, announced the

appointment of ten new members and two incumbents for 3-year terms ending October 31, 2003. Newly appointed members were: Dennis A. Leonardi, Ferndale, California (Region 2); Charles W. Bryant, Austin, Arkansas (Region 4); Arlon E. Fritsche, New Ulm, Minnesota (Region 5); Loren E. Jons, Bonesteel, South Dakota (Region 5); Allard L. Peck, Chippewa Falls, Wisconsin (Region 6); Connie M. Seefeldt, Coleman, Wisconsin (Region 6); Wayne E. Dykshorn, Ireton, Iowa (Region 7); Sanford L. Jones, Jr., Quitman, Georgia (Region 10); Lewis Gardner, Galeton, Pennsylvania (Region 11); and Edgar A. King, Schuylerville, New York (Region 12). Reappointed to serve second terms were: Pete R. Lizaso, Emmet, Idaho (Region 3); and Merle L. Chaplin, Moundsville, West Virginia (Region 9).

There was one resignation from the Dairy Board in 2000. John B. Stacks, Damascus, Arkansas (Region 4), resigned and was replaced by Neil A. Hoff, Windthorst, Texas. His term expires October 31, 2002.

Lists of current Dairy Board members appear in **Appendix A-1**. **Appendix B-1** is a map of the contiguous 48 States depicting the 13 geographic regions under the Dairy Promotion and Research Order (Dairy Order).

FOREIGN AGRICULTURAL SERVICE

The Secretary of Agriculture has delegated oversight responsibility for all foreign market development activities outside the United States to the Foreign Agricultural Service (FAS) (7 CFR 2.43(a)(24)). FAS reviews the U.S. Dairy Export Council's (USDEC) foreign market development

plan and related export contracts. USDEC export contracts also are reviewed by AMS Dairy Programs to ensure conformance with the Dairy Production Stabilization Act of 1983 (Dairy Act) and Dairy Order and with established policies. The USDA's Foreign Market Access Program and the Market Promotion Program provided matching funds to USDEC for dairy product promotion and market research in Japan, Mexico, Southeast Asia, South Korea, and Latin America.

CONTRACTS

The Dairy Act and Dairy Order require that all contracts expending producer funds be approved by the Secretary (7 CFR 1150.140). During 2000, USDA reviewed and approved 172 Dairy Board and Dairy Management Inc. (DMI) agreements, amendments, and annual plans. Funding approvals were from the 1996, 1997, 1998, 1999, and 2000 fiscal periods. See **Appendix E-1** for the contractors and the initiatives approved by USDA during 2000.

CONTRACTOR AUDITS

During 2000, DMI retained the certified public accounting firm of KPMG Peat Marwick to audit the records of the following: Northeast Dairy Foods Research Center, Cornell University; PR Consultants, LTD; McCracken Brooks Maier; DDB-Chicago, Inc.; and Elrick & Lavidge for projects in dairy foods research, export (through USDEC), school foodservice, cheese advertising services, and marketing research, respectively. DMI is implementing the audit recommendations for improving management and internal controls over contracts.

COLLECTIONS

The Dairy Act specifies that persons who pay producers and producers marketing milk directly to consumers, commonly referred to as "responsible persons," shall remit assessments to the Dairy Board or to Qualified Programs for milk produced in the United States and marketed for commercial use.

The Dairy Act provides that dairy farmers can direct up to 10 cents of their 15-cent per hundredweight assessment to Qualified Programs. During 2000, the Dairy Board received about 5.11 cents of the 15-cent assessment.

COMPLIANCE

Compliance by responsible persons in filing reports and remitting assessments continues in a timely manner and at a high rate. Only minor differences were discovered when comparing the audit results to what was reported by the responsible persons. The Dairy Board also verifies that the credits claimed by responsible persons are actually sent to Qualified Programs. This verification is done by contracts with each Qualified Program.

When non-compliance exists, the Dairy Board takes initial action on the matter. If the Dairy Board is unsuccessful in resolving the violation, the matter is referred to USDA for further action. In 2000, the Dairy Board referred one case to USDA for resolution. USDA, through the National Finance Center, the Office of the General Counsel, and the Department of Justice, has initiated legal action to enforce the Dairy Order.

QUALIFIED PROGRAMS

USDA reviewed applications for continued qualification from 62 Qualified Programs. A list of the 62 active Qualified Programs is provided in Appendix G. In line with its responsibility for monitoring the Qualified Programs, USDA obtained and reviewed income and expenditure data from each of the Qualified Programs. The data reported from the Qualified Programs are included in aggregate form for 1999 and 2000 in **Tables 1-2** and **1-3**.

On December 31, 1999, Federal Order No. 49 advertising and promotion program was terminated as a result of implementation of Federal Order Reform on January 1, 2000.

As of January 1, 2000, the American Dairy Association/Dairy Council of the Upper Midwest and Midland Dairy Association merged to form the Midwest Dairy Association.

National Fluid Milk Processor Promotion Board Oversight

NOMINATIONS AND APPOINTMENTS

The 20 members of the Fluid Milk Board serve 3-year terms, with no member serving more than two consecutive terms. Fluid Milk Board members who fill vacancies with a term of 18 months or less are permitted to serve two additional 3-year terms. Fluid Milk Board members are selected by the Secretary from nominations submitted by fluid milk processors, interested parties, and eligible organizations. In a news release issued on May 14, 2001, the Secretary of Agriculture announced five new appointments

and two reappointments to the Fluid Milk Board. Newly appointed members were: Peter M. Ross, Franklin, Massachusetts (Region 1); Mary F. Williams, Athens, Tennessee (Region 4); Rachel Kyllo, Minneapolis, Minnesota (Region 7); John Robinson, Dallas, Texas (Region 10); and James T. Wilcox III, Roy, Washington (Region 13). Reappointed to serve second terms were: Ann Puelz Ocana, Phoenix, Arizona (At-Large); and Joseph W. Van Treeck, Anchorage, Alaska (At-Large Public Member). The newly appointed and reappointed members were seated at the July 12-14, 2001, Fluid Milk Board meeting.

A list of current Fluid Milk Board members appears in **Appendix A-2**. **Appendix B-2** shows a map depicting the 15 geographic regions under the Fluid Milk Promotion Order (Fluid Milk Order).

ORDER AMENDMENTS

A document announcing amendments to the Fluid Milk Order was published in the June 6, 2000, *Federal Register* (65 FR 35808). The amended Order, which became effective June 7, 2000, modified the establishment and membership provisions. The amendments allow a fluid milk processor to be represented by up to three members on the 20-person Board. The amendments also permit a Board member whose fluid milk processor company affiliation changes to serve on the Board for a period of up to six months or until a successor is appointed, whichever is sooner, provided the eligibility requirements of the Order are met. The amendments help to ensure Board continuity and full representation, and allows the Board to operate in an effective and efficient manner.

PROGRAM DEVELOPMENT

The Fluid Milk Board contracted with the International Dairy Foods Association (IDFA) to manage the program. IDFA contracted with Bozell Worldwide, Inc., Bozell Public Relations, and Marketing Drive Worldwide, Inc. (formerly McCracken Brooks Communications, Inc.), to develop the Fluid Milk Board's advertising, consumer education/public relations, and promotion programs, respectively.

CONTRACTOR AUDITS

The Fluid Milk Board retained the certified public accounting firm of Synder, Cohn, Collyer, Hamilton & Associates P.C., to audit the records of IDFA to determine if the operating expenses charged by the contractor for the period of July 1, 1998, through December 31, 1999, were in compliance with the conditions of their agreement with the Board. Results of the audit were favorable with no major inconsistencies identified. The Board continues to improve its internal contract control system to ensure that the amounts invoiced to the Board are in compliance with established contracts and procedures.

COMPLIANCE

Compliance by fluid milk processors in filing reports and remitting assessments continues in a timely manner and at a high rate. During this fiscal period, there have been no new cases of delinquent accounts referred to USDA.

CHAPTER 3

IMPACT OF GENERIC FLUID MILK AND DAIRY ADVERTISING ON DAIRY MARKETS: AN INDEPENDENT ANALYSIS

The Dairy Production and Stabilization Act of 1983 (Dairy Act; 7 U.S.C. 4514) and the Fluid Milk Promotion Act of 1990 (Fluid Milk Act; 7 U.S.C. 6407) require a yearly independent analysis of the effectiveness of milk industry promotion programs. These promotion programs operate to increase milk awareness and thus the sale of fluid milk and related dairy products. From 1988 to 1994, the U.S. Department of Agriculture (USDA) was responsible for the independent evaluation of the Dairy Program, as authorized by the Dairy Act and issued an annual report to Congress on the effectiveness of the Dairy Program. Beginning in 1995, the Congressional report began including third-party analyses of the effectiveness of the Dairy Program in conjunction with the Fluid Milk Program authorized by the Fluid Act.

For the past three years, the evaluation has been conducted by economists from Cornell University. The economic model used last year was used in the present study, except the data were updated to include observations through 2000. The model used is unique in its level of disaggregation. For instance, the dairy industry is divided into retail, wholesale (processing), and farm markets, and the retail and wholesale markets include fluid milk and cheese separately. The model simulates market conditions with and without the Dairy and Fluid Milk Programs.

In addition to the market-wide analysis, this year's study also includes an examination of the impact of advertising under the two programs on individual household consumption of

specific fluid milk and cheese products. Based on a massive household data set on fluid milk and cheese product purchases obtained from A.C. Nielsen, Inc., an econometric model was developed to measure the impact of generic cheese and fluid milk advertising on eight dairy products. The use of household-level data and the estimation procedure employed allow the total effect of generic advertising to be decomposed into its extensive (frequency of purchase) and intensive (level of consumption) components. The following summarizes the findings of the report. Copies of the complete Cornell evaluation report may be obtained from Cornell University, USDA, the National Dairy Promotion and Research Board, or the National Fluid Milk Processor Promotion Board.

HIGHLIGHTS

Generic fluid milk and dairy product advertising conducted under the Dairy and Fluid Programs had a major impact on dairy market conditions. Over the period 1996-2000, on average, the following market impacts would have occurred if the two promotion programs had not been in effect:

- Fluid milk consumption would have been 2.6 percent lower.
- Cheese consumption would have been 1.2 percent lower.
- Total consumption of milk in all dairy products would have been 1.4 percent lower, or roughly 2.2 billion pounds of milk on a butterfat equivalent basis.

- The average price received by dairy farmers would have been 9.8 percent, or $1.17 per hundredweight lower.
- Commercial milk marketings by farmers would have been 0.8 percent lower.

Over the same period, the following market impacts would have occurred if the Dairy Program had not been in existence (assuming the Fluid Program was in effect):

- Fluid milk consumption would have been 1.1 percent lower.
- Cheese consumption would have been 1.4 percent lower.
- Total milk consumption would have been 0.9 percent lower, or roughly 1.5 billion pounds of milk on a butterfat equivalent basis.
- The average price received by dairy farmers would have been 5.6 percent, or $0.78 per hundredweight lower.
- Commercial milk marketings by farmers would have been 0.4 percent lower.
- The average benefit-cost ratio (BCR) for the Dairy Program was 4.47.

FACTORS AFFECTING THE DEMAND FOR FLUID MILK AND CHEESE

Because there are many factors that influence the demand for fluid milk and cheese besides advertising, an econometric model was used to

identify the effects of individual factors affecting the demand for these two products. The following variables were included as factors influencing per capita fluid milk demand: the Consumer Price Index (CPI) for fluid milk; the CPI for non-alcoholic beverages, which was used as a proxy for fluid milk substitutes; per capita disposable income; percent of U.S. population under six years old; variables to capture seasonality in fluid milk demand; a trend variable to capture changes in consumer tastes towards fluid milk over time; expenditures on brand fluid milk advertising; and expenditure on generic fluid milk advertising.

The following variables were included as factors influencing per capita cheese demand: the CPI for cheese; the CPI for meat, which was used as a proxy for cheese substitutes; per capita disposable income; variables to capture seasonality in cheese demand; a trend variable to capture changes in consumer tastes towards cheese over time; expenditures on brand cheese advertising; and expenditures on generic cheese advertising.

The model was estimated with national quarterly data from 1975 through 2000. To account for the impact of inflation, all prices and income were deflated. Brand and generic fluid milk and cheese advertising expenditures were deflated by the Media Cost Index. Because advertising has a carry-over effect on demand, past advertising expenditures also were included in the model as explanatory variables.

The relative impacts of variables affecting demand can be represented with what economists call "elasticities," which measure the percentage change in per capita demand given a 1 percent

change in one of the identified demand factors. **Table 3-1** presents the estimated elasticity values for primary demand factors for fluid milk and cheese. For example, the income elasticity of demand for fluid milk equal to 0.13 means that a one-percent increase in per capita income increases per capita fluid milk demand by 0.13 percent.

The most important factor affecting per capita fluid milk demand is the percentage of population under six years old. As **Table 3-1** illustrates, after peaking in 1993, the percentage of population under six years old has steadily declined, which has had a large negative effect on per capita fluid milk demand since younger children consume a larger share of fluid milk than older segments of the population. It is clear from **Table 3-1** that per capita milk demand has followed a similar pattern to the change in the proportion of the U.S. population under six years old. The most important factor affecting per capita cheese demand is the retail price of cheese. The results indicate that for a one-percent reduction in the retail prices of cheese, per capita quantity demanded would increase by almost 0.4 percent.

The elasticity of generic advertising for fluid milk was 0.045. This means that for each one-percent increase in expenditures for generic fluid milk advertising, fluid milk consumption would be expected to increase 0.045 percent. The elasticity of generic advertising for cheese was also positive, but at 0.019, was almost 2.5 times smaller in magnitude than the generic elasticity for advertising of fluid milk. One reason why generic fluid milk advertising may be more effective in increasing demand than generic cheese advertising

is that fluid milk is a much more homogeneous product than cheese.

It is hypothesized that advertising of pizza and cheeseburgers has a positive effect on the consumption of cheese. Such variables were not included in the model due to a lack of data. Assuming pizza and cheeseburger advertising has a significantly positive effect on cheese consumption, omission of these variables would result in the impact of generic cheese advertising being overstated.

IMPACT OF THE DAIRY AND FLUID MILK PROGRAMS

The market impacts of the Dairy and Fluid Programs were examined over the time period 1996-2000. These two programs are complementary in that they both share a common objective to increase fluid milk sales. To do this, both programs invest in generic fluid milk advertising, which is different from brand advertising in that the goal is to increase the total market for fluid milk rather than a specific brand's market share. In the evaluation of the programs, it is assumed that a dollar spent on fluid milk advertising by dairy farmers has the same effect on demand as a dollar spent by processors on fluid milk advertising, since both programs have an identical objective. The Dairy Program additionally has an objective to expand the market for cheese. Accordingly, part of its budget is directed to generic cheese advertising. To examine the impacts that the two programs had on the markets for fluid milk and cheese over this period, the economic model was simulated under two scenarios based on the level of generic advertising expenditures:

(1) a baseline scenario, where generic advertising levels were equal to actual generic advertising expenditures under the two programs, and (2) a no-national program scenario, where there was no fluid milk processor nor dairy farmer advertising program. A comparison of these two scenarios provides a measure of the combined impacts of the two programs.

Table 3-2 presents the annual averages for supply, demand, and price variables over the period 1996-2000 for the two scenarios. Generic advertising by the Dairy and Fluid Programs has had a positive impact on fluid milk consumption over this period. Specifically, fluid milk consumption would have been 2.6 percent lower had the two programs not been in effect. Likewise, generic cheese advertising under the Dairy Program had a positive impact on cheese consumption, i.e., consumption would have been 1.2 percent lower without generic advertising. Consumption of milk used in all dairy products would have been 1.4 percent lower had these two programs not been in effect during 1996-2000.

Generic advertising by dairy farmers and milk processors also had an effect on the farm milk price and milk marketings. The simulation results indicate that the all-milk price would have been $1.38 per hundredweight lower without the generic advertising provided under the two programs. The farm milk price impacts resulted in a slight increase in farm milk marketings. That is, had there not been the two advertising programs, farm milk marketings would have been 0.8 percent lower over the 1996-2000 period due to the lower milk price.

A third scenario was simulated to measure the market impacts of the advertising program supported by the 15-cent checkoff program by dairy farmers. This scenario assumes that the only advertising program in effect is the one operated by the milk processors. A comparison of this scenario with the baseline gives a measure of the market impacts of the 15-cent dairy producer program.

The last two columns of **Table 3-2** present the results of this scenario, and the results are similar to the combined fluid milk processor and dairy farmer advertising program results. Had there not been fluid milk and cheese advertising sponsored by dairy farmers, fluid milk demand would have been 1.1 percent lower, cheese demand would have been 1.4 percent lower, and total milk demand would have been 0.9 percent lower than it actually was. Advertising under the Dairy Program also had a significant impact on the farmer milk price. The simulation results indicate that the all-milk price would have been $0.78 per hundredweight lower without generic advertising by the Dairy Program. Finally, farm milk marketings would have been slightly lower (0.4 percent) in the absence of the Dairy Program.

BENEFIT-COST OF THE DAIRY PROGRAM

One way to measure whether the benefits of a program outweigh the cost is to compute a benefit-cost ratio (BCR). A BCR can be computed as the change in net revenue due to advertising divided by the cost of advertising. While a BCR can be estimated for the Dairy Program, it cannot be computed at this time for the Fluid Program because data on packaged fluid milk wholesale

prices, which is necessary in calculating processor net revenue, are proprietary information and not available.

The BCR for the Dairy Program was calculated as the change in dairy farmer net revenue due to the existence of the Dairy Program divided by the costs of the Dairy Program. The cost of the Dairy Program was measured as the 15 cents per hundredweight assessment. The results show that the average BCR for the Dairy Program was 4.47 from 1996 through 2000. This means that each dollar invested in generic fluid milk and cheese advertising by dairy farmers during the period returned $4.47, on average, in net revenue to farmers.

Another way to interpret this figure is as follows. On average over the period 1996-2000, the Dairy Program cost dairy producers $239.4 million per year. The fluid milk and cheese advertising invested from the Dairy Program resulted in higher milk demand, milk prices, and profits for dairy producers nationwide. Based on the simulations conducted with the economic model, it is estimated that the average annual increase in net revenue due to advertising under the Diary Program was $1.07 billion, which represents 4 percent of total farm cash receipts from milk marketings. Dividing $1.07 billion by the total checkoff program cost of $239.4 million results in the benefit cost estimate of 4.47.

HOUSEHOLD-LEVEL ANALYSIS OF THE TWO PROGRAMS

The impacts of advertising by the Fluid and Dairy Programs also were analyzed utilizing

household-level purchase data. Specifically, at-home demand functions for fluid milk and cheese products were estimated based on a model that decomposes fluid milk and cheese purchases into two components: (1) frequency of purchase (i.e., how often the household purchases), and (2) intensity of purchases (i.e., the quantity purchased). The use of household-level data and the estimation procedure employed allows the decomposition of the total effect of generic advertising on its extensive (frequency of purchase) and intensive (level of consumption) components. This is particularly important when evaluating advertising programs to determine to whom the message has been successfully delivered, new or current consumers.

Fluid milk and cheese purchase data for at-home consumption and annual household demographic data were obtained from the AC Nielsen Homescan Panel sample of U.S. households from January 1996 through December 1999. The dairy product purchase data is purchase-occasion data where households use hand-held scanners to record food purchase information including date of purchase, UPC code, total expenditure, and quantities purchased. Along with this, sample households submit annual demographic information.

Approximately 20,000 households were included in the estimation of the fluid milk and cheese product demand equations. National generic fluid milk and cheese advertising expenditures were merged with the household data. Since advertising expenditures are national, it is assumed that each household in the sample received the same exposure to generic advertising over time.

Fluid milk was disaggregated into four subcategories: whole, reduced fat (2%), light (0.5%-1%), and skim milk. Reduced fat milk was the most common milk product, followed by skim and then whole and light milk. Cheese was disaggregated into American, Mozzarella, Processed, and Other cheese categories. The Other cheese category contains numerous varieties, including Ricotta, Muenster, Farmers, brick, and cream cheese. Processed cheese had the highest average consumption, followed by Other and American cheese, while Mozzarella was a distant fourth.

Net price, household income, household size, and generic advertising are the basic exogenous variables included in the demand models. To account for price variation due solely to volume and store discounts, variables that reflect the proportion of purchases in various package sizes and store types were included. Differences in household composition are accounted for with variables reflecting age of the household head, whether mom works outside of the home, and the proportion of family members by age classification. The demand models also control for race, education, geographic location, and seasonality.

While the market-wide, total commercial disappearance economic model is entirely different and uses a different data set than the household model, it is interesting that price and advertising elasticities are quite similar, which can be seen by comparing the results presented in **Tables 3-1 and 3-3**. For example, the total price elasticities calculated from the household data for total milk and total cheese were -0.173 and -0.341, respectively, which is nearly identical to those calculated with aggregate market-level data presented in Table 1 (-0.160 and -0.373). As expected, the

total advertising elasticities for total milk and cheese were slightly higher than those reported earlier, but this is due to the use of data for at-home consumption only. That is, since advertising focuses on at-home consumption, one would expect the advertising elasticities to be higher in the at-home demand model than in the total commercial disappearance demand model that includes away-from-home consumption as well. Interestingly, the same result holds as before regarding the fluid milk advertising elasticity being about three times larger than the cheese advertising elasticity (0.081 for all fluid milk products vs. 0.024 for all cheese products).

Since the focus is on the decomposition of the extensive and intensive effects on total demand (particularly for advertising), attention is directed to the computation of the corresponding elasticities. The frequency of purchase elasticity represents the percentage change in frequency of purchase for a 1% change in the selected variable (i.e. the extensive effect), while the intensive elasticity represents the percentage change in the quantity demanded, given a purchase occasion, for a 1% change in the selected-variable (i.e. the intensive effect). The total elasticity represents the sum of the extensive and intensive effects.

Long-run generic advertising elasticities were positive and significant for all fluid milk products. The generic advertising message appears to have a predominantly intensive effect on fluid milk demand. For total fluid milk, the total long-run advertising elasticity was 0.081, 88% of which can be attributed to increasing the amount of purchase per purchase occasion, while only

12% can be attributed to increasing the frequency of households to purchase. This is consistent across all categories, with the largest relative response from the generic campaign shown for reduced fat (0.081) and skim milk (0.082), followed closely by whole (0.074) and light milk (0.072). Whether the results would be similar from a more differentiated campaign with respect to fat content is an empirical question and cannot be gleaned from these results; however, the relative similarity in response across all products seems consistent with the generic advertising message.

While positive and significant in the total cheese category, the effectiveness of the generic cheese advertising campaign appears lower than that estimated for fluid milk. The total cheese advertising elasticity was estimated to be 0.024; however, the entire amount of this was realized from the extensive margin. That is, cheese advertising appears to be effective at increasing the frequency of purchase, but has no significant effect on increasing the amount of purchase per purchase occasion. This is consistent across all cheese products in which no intensive demand elasticities were significantly different from zero. The largest contributors to the total cheese result were from Other cheese (0.069) and American cheese (0.063), while the Processed (0.021) and Mozzarella (0.021) advertising elasticities were more similar in magnitude to that of the aggregate product. It is interesting that while both programs are generic and do not target any specific products, the individual product advertising elasticities are more variable for the relatively differentiated cheese products, but are much

more similar for the relatively homogeneous fluid milk products.

From the wide disparity in extensive versus intensive advertising response, it is clear that the fluid milk and cheese generic advertising campaigns are inducing response from different types of consumers. While fluid milk advertising seems most effective at increasing the amount of purchases per purchase occasion, its effect on purchase frequency is less pronounced. Conversely, the effect that cheese advertising has had on total household demand is clearly from increasing the frequency of purchase by U.S. household, not from increasing the level of purchases per purchase occasion. Information such as this provides valuable information to dairy product marketers in determining where past efforts have been most effective and in developing future advertising strategies with respect to their target audience.

Table 3-1. Estimated elasticity values for factors affecting the retail demand for fluid milk and cheese.[a]

Factors Affecting Demand	Fluid Milk	Cheese
Retail price	-0.160	-0.373
Per capita income	0.130	0.200
Brand advertising	0.009	0.020
Generic advertising	0.045	0.019
Percent of population younger than six years old	0.530	n.a.*

[a] Example: A 1 percent increase in the retail price of fluid milk is estimated to reduce per capita sales of fluid milk by 0.16 percent.
See **Table 3-4** for variable sources, means and standard deviations.
* n.a. means "not applicable."

Table 3-2. Simulated annual average impacts of the Dairy and Fluid Milk Programs on selected market variables, 1996-2000.

Market Variable	Unit	Baseline Scenario[a]	No-National Program Scenario[b]	Percent Difference	No-Dairy Program Scenairo[c]	Percent Difference
Fluid milk demand	bil lbs	55.3	53.9	-2.6	54.7	-1.1
Cheese demand	bil lbs, ME butterfat basis[e]	65.5	64.8	-1.2	64.6	-1.4
Total dairy demand	bil lbs	161.4	159.2	-1.4	159.9	-0.9
All milk price	$/cwt	14.07	12.69	-9.8	13.29	-0.4
Milk marketings	bil lbs	159.6	158.3	-0.8	159	-0.4
Benefit-cost ratio[d]	$ per $1	—	—	—	4.47	—

[a] The baseline scenario reflects the operation of the Dairy and Fluid Milk Programs.
[b] The no-national-program scenario assumes there is no generic advertising for fluid milk and cheese.
[c] The no-Dairy Program scenario assumes there is no generic advertising for fluid milk and cheese by dairy farmers, but there is fluid milk advertising by milk processors.
[d] The BCR for the Dairy Program only.
[e] ME = Milkfat Equivalent

Table 3-3. Price and long-run advertising elasticities for milk and cheese products. [1]

Variable	Price			Advertising		
	Frequency	Intensive	Total	Frequency	Intensive	Total
Total Milk	-0.037 *	-0.136 *	-0.173 *	0.010 *	0.071 *	0.081 *
Whole	-0.605 *	-0.167 *	-0.772 *	0.011 *	0.063 *	0.074 *
Reduced Fat	-0.529 *	-0.128 *	-0.657 *	0.009 *	0.073 *	0.081 *
Light	-0.563 *	0.027	-0.535 *	0.014 *	0.058 *	0.072 *
Skim	-0.522 *	-0.007	-0.529 *	0.016 *	0.066 *	0.082 *
Total Cheese	-0.157 *	-0.184 *	-0.341 *	0.023 *	0.000	0.024 *
American	-1.027 *	-0.221 *	-1.248 *	0.062 *	0.001	0.063 *
Mozzarella	-1.235 *	-0.342 *	-1.577 *	0.025 *	-0.004	0.021 *
Processed	-0.500 *	-0.113 *	-0.613 *	0.024 *	-0.003	0.021 *
Other Cheese	-0.438 *	-0.289 *	-0.726 *	0.067 *	0.002	0.069 *

[1] Evaluated at sample means.

* Significance at the 1% level.

Table 3-4. Source and Descriptive Statistics for Fluid Milk and Cheese Demand Data used in Econometric Model

Variable	Average	Stan. Dev	Source
Retail milk price index (1982-84=100)	111.8	25.6	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail cheese price index (1982-84=100)	113.2	30.4	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail nonalcoholic beverage price index (1982-84=100)	105.1	24.4	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail meat price index (1982-84=100)	113.6	27.1	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Civilian population (mil)	245.2	17.8	US Printing Office. 1975-00. *Economic Report of the President*. Washington, D.C.
Disposable income (bil $)	3,701	1,754	US Department of Labor, Bureau of Labor Statistics 1975-00. *Employment and Earnings*, Washington, D.C.
Consumer price index (1982-84=100)	116.4	36.1	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Percent of population younger than six years old (%)	7.32	2.2	US Printing Office 1975-00. *Economic Report of the President*. Washington, D.C.
Deflated generic milk advertising expenditures ($1,000)	4,770	2,880	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated brand milk advertising expenditures ($1,000)	821	479	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated generic cheese advertising expenditures ($1,000)	2,227	1,534	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated brand cheese advertising expenditures ($1,000)	6,970	2,444	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.

CHAPTER 4

FLUID MILK MARKET AND PROMOTION ASSESSMENT

For the second consecutive year, Beverage Marketing Corporation (BMC) has been commissioned to review the fluid milk advertising and promotional programs. This review offers a subjective evaluation of the effectiveness of those programs. To accomplish this review, BMC first evaluated milk programs relative to milk's competitive beverage set. BMC believes milk's competitive set includes most non-alcoholic refreshment beverages, specifically carbonated soft drinks, bottled water, fruit beverages, ready-to-drink teas and sports beverages. This year BMC was able to reconstruct milk's performance relative to its competitive set between 1985 and 2000. Milk's performance, in the form of indexed share of competitive set annual volume turnover, provides an additional quantitative measure for judging advertising and promotional effectiveness. The following summarizes the report.

BMC'S ASSESSMENT OF CURRENT MILK INDUSTRY ENVIRONMENT

Total fluid milk volume has increased for two consecutive years, even surpassing the growth rate of carbonated soft drinks in 2000. BMC believes these increases reflect the growing cumulative value of the generic fluid milk programs, which have been in effect since 1995.

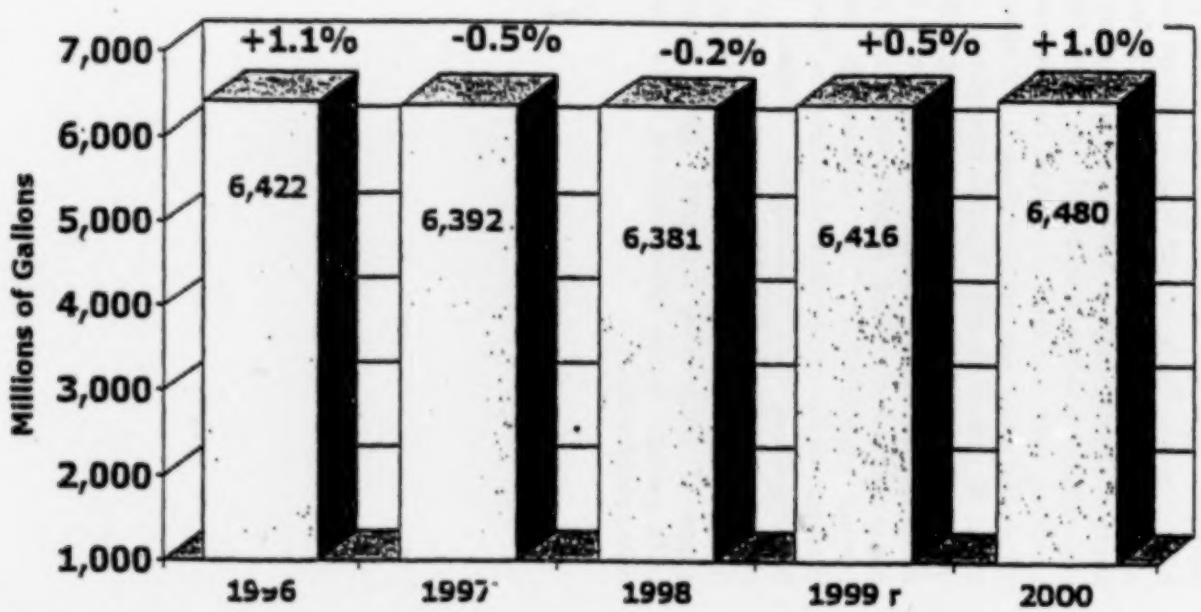
Milk's compound annual growth rate (CAGR) was 0.2% from 1996 to 2000. The total competitive set, including milk, grew at a CAGR of 2.7% from 1996 to 2000. Milk, while still losing share to the competitive beverage set, has been steadily increasing its share of competitive turnover for

four of the last five years. Without milk, the competitive set would have risen at a CAGR of 3.7% in the same period. Within the competitive set, bottled water has been the star performer; it is interesting to note that the competitive set would have grown at a CAGR of just 1.6% from 1996 to 2000 excluding bottled water. In 2000, fluid milk continued to show signs of a rebound and demonstrated a one-year volume growth of 1.0% over 1999. This growth is in gallons of fluid milk (as opposed to pounds), and is calculated using scanner data from information Resources and other sources. Growth in 1999 was 0.5%. (USDA fluid milk sales data report a -0.4% decline 2000 and a +0.7% increase in 1999.)

The history of volume changes for fluid milk consumption over the past five years is shown in **Figure 1**. It appears that the strong marketing campaign under the Dairy Production and Stabilization Act of 1983 (Dairy Act) and the Fluid Milk Promotion Act of 1990 (Fluid Milk Act) has stemmed the years of volume losses that milk has endured. In addition, the competitive environment for milk is more challenging than ever today with an ever-increasing array of competitive products available to consumers.

This year's review includes an analysis of milk's annual share of the volume increase experienced by the entire competitive set over the past 15 years. The measure of milk's performance is its indexed share of competitive volume change, divided by milk's market share of the competitive set at the beginning of the year. When this index is greater than 1, milk is improving its share. When less than 1, milk's share of the competitive set is declining. The data from 1986 to 2000 are shown in **Figure 2.**

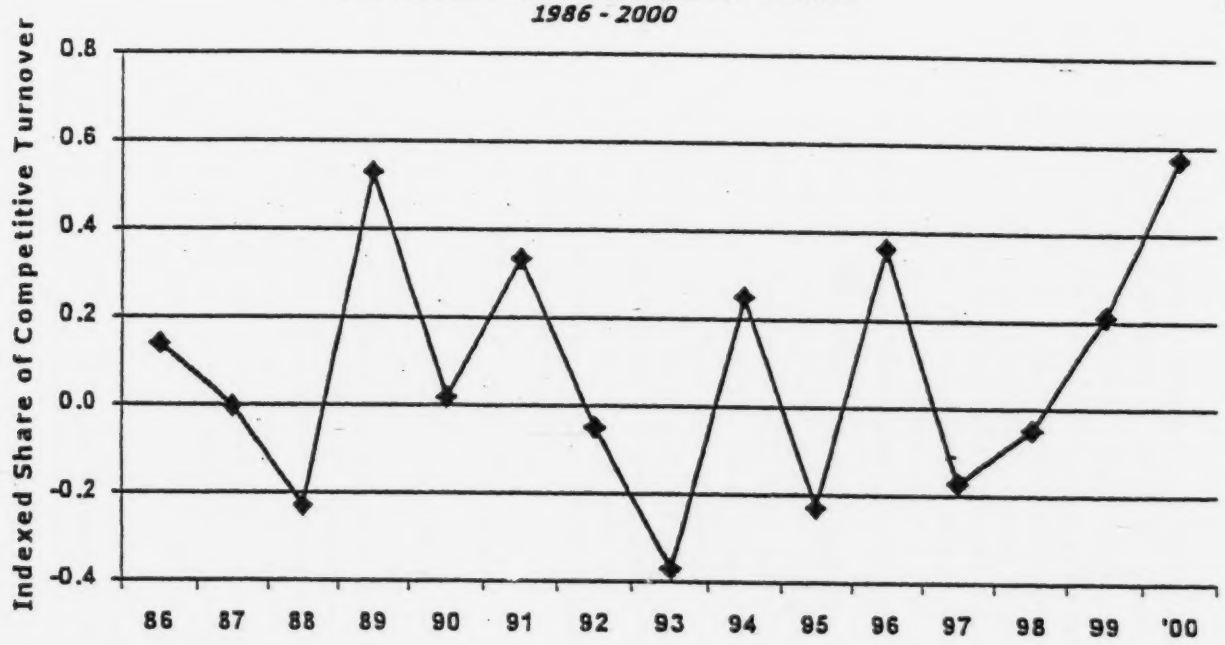
Figure 1:
Fluid Milk Volume and Growth
1996 - 2000



r=revised
Source: Beverage Marketing Corporation

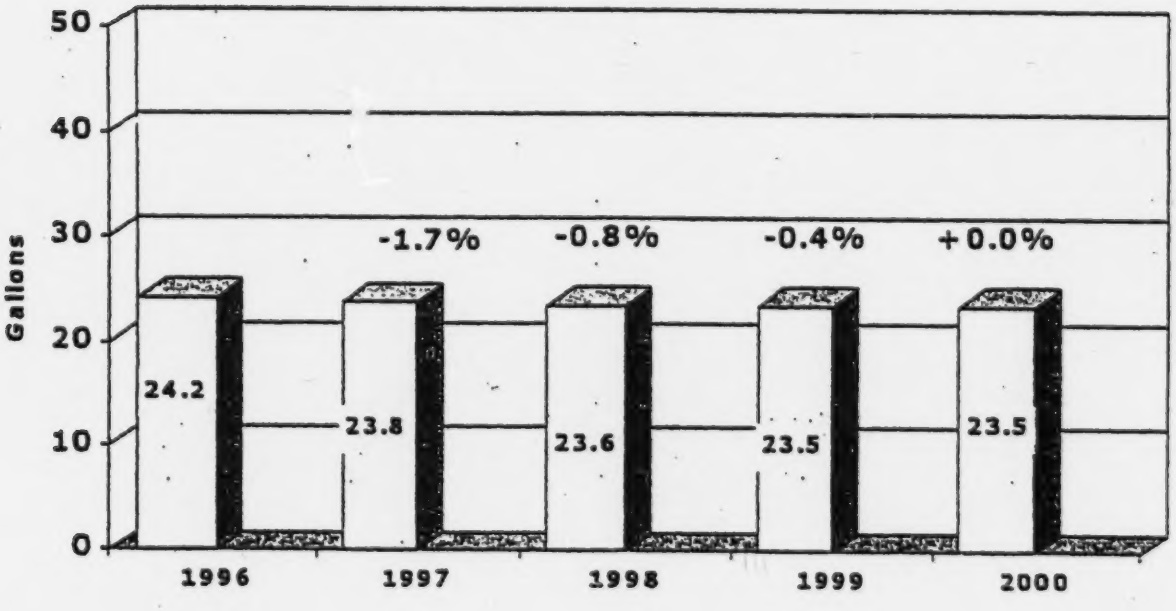
Between 1986 and 1995, as milk's overall performance was declining on both a volume basis and per capita consumption basis, its indexed share of the competitive turnover varied more or less randomly between -0.4 and 0.6. Since 1995, however, milk has shown marked improvement. While the index remains less than 1, the upward trend is unmistakable. Annual changes in the index can be due to many factors, but in BMC's analysis, the only identifiable and consistent factor is the abrupt uptick in advertising and promotion expenditures. This observation lends credence to the notion that advertising is favorably impacting milk consumption. Without the advertising and promotion program, milk is likely to have continued its random variation in share of competitive turnover. BMC believes milk volume would have declined more under those circumstances.

Figure 2:
Milk Indexed Share of Competitive Turnover
1986 - 2000



Source: Beverage Marketing Corporation

Figure 3:
Fluid Milk Per Capita Sales In Gallons
1996 - 2000



Source: Beverage Marketing Corporation

BMC data reveals that per capita milk volume as shown in **Figure 3** is virtually unchanged in 2000 after a three-year slide. While this data is not consistent with USDA fluid milk sales data in measured pounds, it is consistent with scanner data measuring sales of fluid milk through key retail channels. BMC believes this turnaround is the result of the cumulative effect of approximately six years of well designed and executed generic advertising and promotion programs.

In the absence of substantial branded advertising, BMC believes this generic campaign has been very successful. Ultimately, branded advertising is needed to make the category more competitive in the beverage marketplace because brands are more effective at cuing consumer purchases. Nevertheless, milk as a product has some other disadvantages, which also must be addressed, including limited product innovation and convenience packaging.

Milk's challenge of continued growth is all the more complicated by the fact that competitive products have usurped milk's positioning as the ultimate healthy beverage. For example, many beverages are now formulated with calcium like orange juice, and a wide array of products is perceived to be healthy, such as bottled waters and teas. In fact, bottled water is likely to eclipse milk (as well as coffee and beer) to have the second highest per capita consumption after carbonated soft drinks by 2004. See **Figure 4.**

As discussed in last year's report, BMC continues to believe milk's mixed performance is attributable to limitations in six key areas:

Consumer attention

- An ever-increasing array of products competes for the attention of the consumer. Some of them have co-opted milk's product attributes, such as a source of calcium.

Product attributes

- While milk has begun to innovate, it lags almost every other category in the competitive set in this respect.
- Milk still offers limited new products and flavors as well as usage occasions.

Figure 4:
Per Capita Consumption and Change
(Gallons)
1999-2000

Category	1999	2000	% Change
CSD	55.9	55.7	-0.4
Bottled Water	15.6	18.2	16.7
Milk	23.5	23.5	0.0
Fruit Beverages	15.2	15.2	0.0
Sports Drinks	2.3	2.5	8.7
RTD Tea	1.9	1.8	-5.3

Source: Beverage Marketing Corporation

Branding

- Milk lacks well-developed brands and the competitive set is dominated by many large brands.
- More than half of milk volume is private label and just a fraction of the competitive set is accounted for by private label.

Distribution

- Milk has begun to make inroads in the fast-growing immediate consumption channels, but still has room to improve.
- Product perishability continues to limit promotion, display and impulse sales.

Marketing Effectiveness

- Strides have been made in the coordination and alignment between the national program developers, processors, and retailers over the last year, but there remains an opportunity for further improvement.

Pricing

- Milk rarely uses price promotion, while the rest of the competitive set uses it to encourage stock-up. Again, milk's perishability is limiting because it reduces the likelihood of stock-up.

BMC'S ASSESSMENT OF CURRENT MILK MARKETING PROGRAMS

Beverage Marketing Corporation believes and the available evidence suggests that the fluid milk advertising and promotion programs continue to achieve the primary goal of increasing fluid milk consumption. This achievement of improved consumption in the face of substantially more intense beverage competition suggests that milk's advertising and promotional activities are pushing the right buttons with consumers.

Fine tuning of the program over the last year has begun to effectively address the issues of

program efficiency that BMC raised in 2000. While still effective, the milk programs are in need of some strategic re-thinking to move the messaging to higher order consumer benefits as competitors begin to piggy-back on the nutritional proposition (mainly calcium) supported by the milk program.

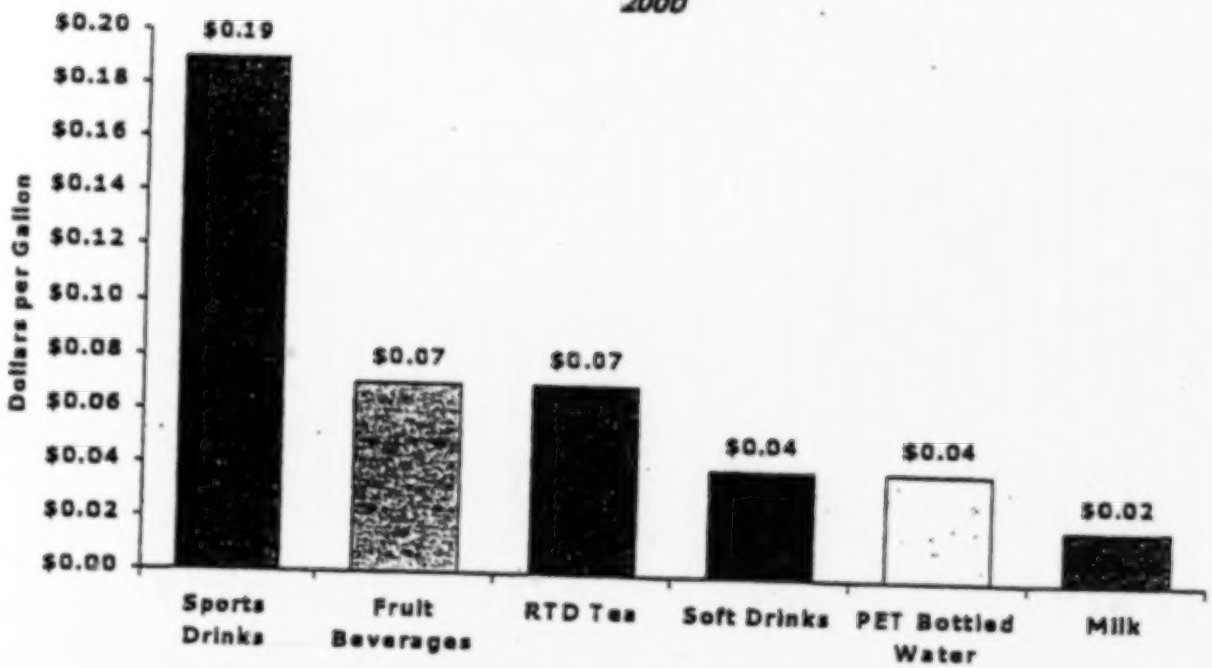
The Cornell University econometric model (see Chapter 3) continues to demonstrate that the advertising program helps. The latest, more detailed econometric model produces significant positive advertising elasticities (.081) for fluid milk. The model reveals that milk advertising has been effective in increasing consumption among existing users, but somewhat less effective at bringing in new users. This may mean the impact of the campaign is beginning to soften.

The milk industry has successfully developed a targeted, integrated marketing program that is by all available measures a success. The campaign has particularly high awareness levels. Perhaps the program's greatest strength has been its memorable, award-winning advertisements and "got milk?®" tagline. In addition, this campaign has featured a wide collection of endorsements from a very diverse group of celebrities – from popular actors and professional athletes to cartoon characters. Not only has this helped to contemporarize milk, but also the diversity of celebrities has given the campaign broad appeal across many demographic groups. The messaging mix between primarily print and broadcast media continues to add to the effectiveness of the campaign.

This has been achieved in the face of greater spending by all of the other beverages in milk's

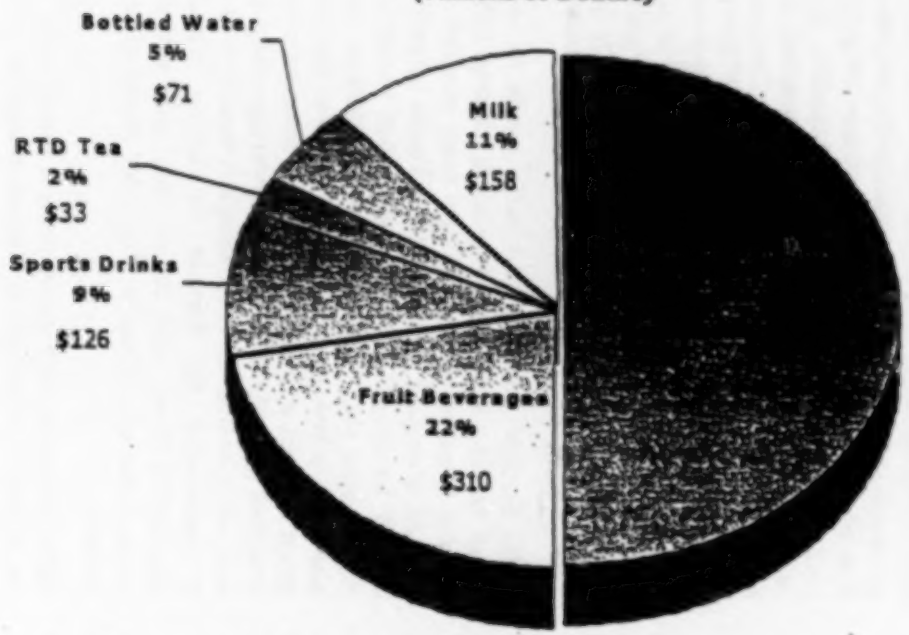
competitive set. Furthermore, milk's share of voice in measured media declined in 2000 over 1999. Within the competitive set, sports drinks spent the most per gallon, while milk spent the least. Overall, carbonated soft drinks spend the most on advertising, but cents per gallon spending is relatively low due to the great volume of products sold and consumed as shown in **Figure 5.** In 1999, bottled water spent the least per gallon advertising, but increased network TV advertising in 2000, surpassing milk. In total, carbonated soft drinks account for about half of all ad spending of the competitive set. See **Figure 6.**

Figure 5:
Competitive Set Ad Spending per Gallon
2000



Source: Beverage Marketing Corporation; Competitive Media Reporting

Figure 6:
Ad Spending by Category
2000
(Millions of Dollars)



Source: Beverage Marketing Corporation; Competitive Media Reporting

BMC believes the milk program's greatest weakness may be the need to evolve advertising messaging from functional/nutritional to higher order consumer needs states and emotional benefits. While the nutritional positioning is strong, it is primarily based on functional benefits. The calcium benefit is no longer a strong point of differentiation from the competitive set. Competitive branded products almost entirely utilize higher-order consumer need states in their advertising to impart, for example, messages of self esteem, well being, and confidence. These kinds of messages are rarely imparted in generic advertising campaigns.

BMC further believes that milk needs to continue to fine-tune its advertising demographic mix to greater emphasize the teen market as well as emerging ethnic groups. Youth targeting should be in all venues where that consumer shops, and should complement a renewed emphasis in school programs. One problem the program can not address alone is the need for more branded advertising. Milk is a beverage category, and not a brand. Thus its image is mostly that of a commodity. By further developing brands, marketing them, and innovating, milk can become more appealing to a broader range of consumers.

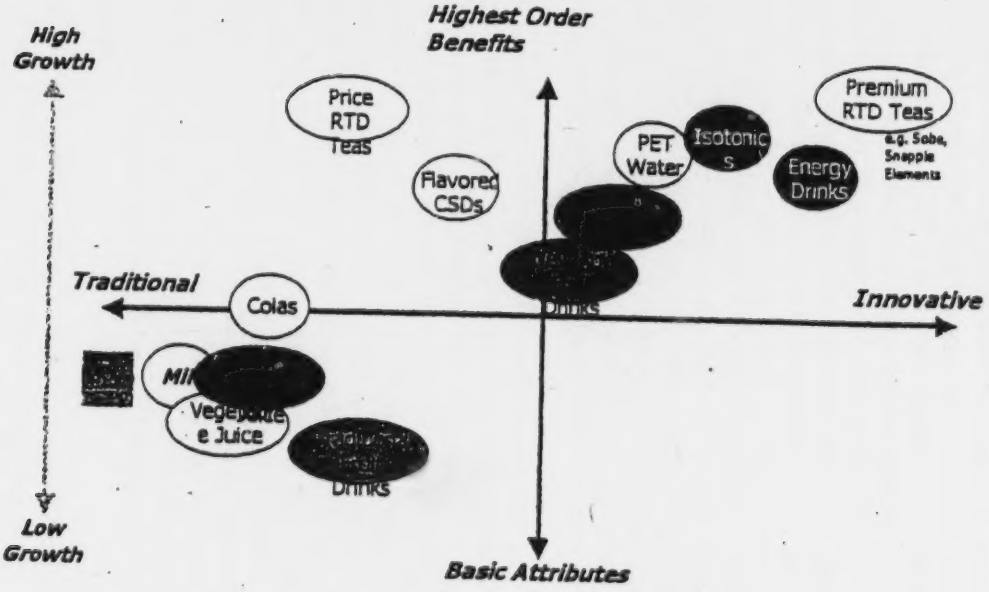
BMC believes milk must remain competitive in its share of voice with the other categories in its competitive set. While increased spending does not always translate into increased sales, milk must be cognizant of the superior spending of much of its competitive set. The cumulative impact of ad spending disparities between milk and the competitive set can only put milk at a greater disadvantage over time. While milk accounts for

about 20% of the volume of the competitive set, it only accounts for about 11% of share of voice within the competitive set. Milk can make its dollars work harder and go farther by targeting its spending better focusing on the most important demographic sectors. Gross spending does not tell the entire story.

The spending disparity is even greater in promotional spending where carbonated soft drinks, for example, may spend as much as 10 times what milk spends on promotions. Total milk promotional spending levels should be significantly increased to match competitive share of voice.

BEST AVAILABLE COPY

Figure 7:
Consumer Benefits Hierarchy vs. Level of Innovation



Source: Beverage Marketing Corporation

App. 98

Over the last year, milk has made strides in improving the alignment of marketing programs, but there is still room for improvement. Marketing programs should include all aspects of integrated marketing, i.e., positioning, packaging, pricing, availability, and public relations. The dairy industry needs to improve its field execution expertise, i.e., better merchandising, more innovative point-of-sale materials, and better dairy case management. While this is traditionally the role of processors, the industry could work to prepare sales and merchandising programs for dairy personnel in retail stores. Assistance could be offered in other areas, such as category management. Dairy processor certification programs could facilitate implementation.

Finally, BMC believes the real key to milk's future growth continues to be innovation. Innovation can come in new products, new packages, and new flavors, for example. Again, processors must take the lead here, but DMI/MilkPEP can help by increasing its focus on innovation research. Once developed, these new ideas could be offered to processors to further test and roll-out. Without the right products and packaging, the effectiveness of the milk industry's marketing programs is blunted. The most successful beverage products today are innovative and provide consumers with basic product attributes as well as higher order benefits. See **Figure 7.**

AGREEMENT

THIS AGREEMENT is made this 27th day of April 1994, by and between the NATIONAL DAIRY PROMOTION AND RESEARCH BOARD, an organization created under the Dairy Product Stabilization Act of 1983, located at 2111 Wilson Boulevard, Suite 600, Arlington, Virginia 22201 ("NDB"), and **UNITED DAIRY INDUSTRY ASSOCIATION**, an Illinois not-for profit corporation located at O'Hare International Center, 10255 West Higgins Road, Suite 900, Rosemont, Illinois 60018-5616 ("UDIA").

PREAMBLE

WHEREAS, the NDB is a national organization created under the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501 *et seq.* (the "Act"), established for the purpose of "carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the market place and to expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States";

WHEREAS, UDIA is a membership corporation whose members are state and regional dairy promotion and research programs, with a purpose of increasing consumption of dairy products;

WHEREAS, both NDB and UDIA conduct programs and projects of research, promotion, education, and information designed to maintain and expand consumption of dairy products;

WHEREAS, both parties believe that by combining their efforts in the planning, origination, development,

contracting, funding, conduct and evaluation of such programs and projects, such programs and projects can be performed more efficiently and effectively; and

WHEREAS, the parties hereto desire to form a not-for-profit corporation on the terms set forth herein for the purpose of accomplishing the ends set forth herein,

NOW, THEREFORE, the parties hereto agree as follows:

1. *Creation of Corporation; Name*. The parties hereto shall form a corporation pursuant to the laws of the District of Columbia, to be known as Dairy Management, Inc. (the "Corporation").

2. *Purposes of the Corporation.*

A. The Corporation's purposes are:

(1) To implement joint programs and projects between NDB and UDIA;

(2) To provide funding, management, staff and other resources, and to plan, develop, and implement programs authorized under federal and state dairy check-off programs;

(3) To provide resources for program evaluation and market research to the NDB and UDIA;

(4) To manage benefit programs for employees of the Corporation, the parties, and related organizations;

(5) To implement specific NDB- and UDIA-funded programs; and

(6) To carry out the administrative, financial and management functions of NDB and UDIA and the Corporation.

B. *Limitation of Authority*. The Corporation will not engage in any business or devote itself to any activities other than those specified in this Agreement, unless reasonably incidental to the purposes set forth herein.

C. *Other Activities*. Except for those activities set forth herein, each party shall be free to engage in any other activity for its exclusive benefit, provided, however, that any such activity shall be funded exclusively by the party carrying out such activities, and the Corporation shall not be liable for any such funding.

D. *No General Partnership or Agency*. Neither party to this Agreement shall be deemed to be a partner of, or agent for, the other party.

E. *Commencement Date*. The term "Commencement Date" shall mean the date on which the program activities of the Corporation begin. The Commencement Date of the Corporation shall occur on or about January 1, 1995, or on such earlier date as the parties may agree, but the Commencement Date shall not occur until all actions set forth in Schedule "A" appended hereto shall have been completed to the satisfaction of legal counsel for each of the parties. The Board of Directors of the Corporation ("Board") is authorized to take all necessary preliminary actions to prepare the Corporation to do business and to commence program activities prior to the Commencement Date.

3. *Articles of Incorporation*. The parties intend to file Articles of Incorporation not later than June 15, 1994. The

Articles of Incorporation shall contain provisions to provide for the following:

A. The duration of the Corporation shall be perpetual.

B. The number of directors on the Board shall be twenty; ten shall be selected to represent the interests of NDB and ten shall be selected to represent the interests of UDIA.

C. The terms of the directors shall be for one year.

D. The purposes of the Corporation shall be as set forth in paragraph 2.A. hereof.

4. *Place of Business.* The Corporation initially shall have two offices: (1) 2111 Wilson Boulevard, Suite 600, Arlington, Virginia 22201 and (2) O'Hare International Center, 10255 West Higgins Road, Suite 900, Rosemont, Illinois 60018. The Board shall determine which functions of the Corporation are to be carried out in each office, and which are to be carried out in both offices. The Board may relocate, close, or expand said offices, or establish offices in other locations as it so determines. All policies of the Board shall apply to the operations in the two offices and shall be established by the Executive Vice Presidents (defined in paragraph 9.A hereinafter) in consultation with each other.

5. *Governance of the Corporation.* The Corporation will be governed by the Board, which shall be composed of twenty members. Ten members of the Board shall be selected to represent the interests of NDB and ten members of the Board shall be selected to represent the interests of UDIA. The parties agree that all Board

members designated by them will agree to vote for the election as directors of all persons designated by the other as Board members. Each of the persons designated to be a member of the Board shall be a member of the Board of one of the parties. Each member of the Board may be removed by the party having the right to designate such member, and each party shall be responsible for filling vacancies left by those members it has designated.

A. *Majority necessary*. All decisions of the Board must be approved by a majority of directors present at meetings of the Board at which a quorum exists.

B. *Functions of Board*. The Board shall be responsible for overall governance of the Corporation. In addition to those functions required by law, its specific duties shall include, without limitation:

(1) Implementation of a joint planning process;

(2) Development and, following approval by the parties, implementation of an Annual Business Plan and annual Budget for the Corporation;

(3) Management of all funds and assets of the Corporation, and development of all budgets of the Corporation;

(4) Development and approval of joint personnel policies and compensation and benefit programs for employees of Corporation;

(5) Development and approval of by-laws and operating rules for the corporation;

(6) Selection, hiring, firing, and overall management of the officers and employees of the corporation, which authority may be delegated to appropriate corporate officers.

6. *Interim Organizational Management.* Prior to the Commencement Date, the organizational management of the Corporation shall be carried out as follows:

A. *Organizational Management to June 15, 1994.* Upon execution of this Agreement, and until June 15, 1994, the pre-incorporation organizing activities set forth in this Agreement shall be conducted by an Organizing Committee comprised of the Chairman, First Vice Chairman, and Treasurer of UDIA, and the Chairman, Secretary, and Treasurer of NDB (the "Organizing Committee"). The Organizing Committee shall be responsible for carrying out all of the actions necessary to create, qualify, and organize the Corporation pursuant to this Agreement and the laws of the District of Columbia, including hiring employees. The parties will share the expense of the Organizing Committee equally.

B. *Organizational Management from June 15, 1994 to Commencement Date.* Each party shall select its ten members of the Corporation's initial Board of Directors prior to June 15, 1994. The Board shall be responsible for all actions necessary to prepare the Corporation for the commencement of program activities and the Commencement Date pursuant to this Agreement, and it shall be authorized to take such actions as are necessary to carry out its responsibilities, the expenses for which shall be shared equally by the parties. Prior to the Commencement Date, and allowing sufficient time for each of the parties to take appropriate action, the Board will submit to each of

the parties an annual business Plan and Budget for the first year of operations of the Corporation.

C. *Commencement Date and thereafter.* On and after the Commencement Date, the Board will possess all power and authority of the Corporation as set forth in this Agreement.

7. *Annual Budget Development and Allocation.*

A. In developing each Annual Budget, the Board shall allocate its expenditures to the following categories:

(1) *Core Costs.* Core costs shall include the basic cost of salaries and benefits for employees of the Corporation and general administrative costs for the operation of the Corporation, and shall also include the costs of planning activities. Core costs shall not include NDB/USDA direct compliance costs, including without limitation, costs charged by USDA for oversight of NDB.

(2) *Program Costs.* Program costs shall consist of the costs attributable to expenditures, not including core costs, of implementing the programs contained in the annual Business Plan and the annual Budget.

B. *Allocation of costs.* For purposes of fiscal management (paragraph 8 below), all costs incurred by the Corporation under the Annual Business Plan and annual Budget shall be shared equally by the parties, except as otherwise provided herein. The Annual Business Plan and annual Budget may include specific programs jointly undertaken by the Corporation which are not funded equally by the parties. The Annual business Plan and Annual Budget may also include specific identified programs which are to be implemented on behalf of either of

the parties individually. In the event that the annual Business Plan contains such specifically identified joint or individualized programs, the costs for implementing such program, including a *pro rata* portion of core costs and program costs attributable to such individualized programs, shall be allocated to the party on whose behalf such program is to be implemented, or unequally in accordance with the Annual Business Plan and Annual Budget.

8. *Fiscal Management.* The financial affairs of the Corporation shall be overseen by the Board, which may delegate all or any part of such authority to the Executive Vice Presidents or other officers.

A. *Organizing Expenses.* All expenses incurred prior to the Commencement Date by the Organizing Committee and the Board shall be shared equally by the parties to this Agreement, provided, however, that all salaries, benefits, and travel and related expenses incurred in connection with the compensation and reimbursement of individual employees and Board members of the parties assigned to carry out this Agreement shall be paid by the respective party employing such individuals.

B. *Contributions of Parties.* Subject to approval by each of the parties of each Annual Business Plan and Budget, and the budgets therefor, the parties shall be responsible for providing all funding, as contained in the Annual Business Plan and Budget or as otherwise agreed, for the operations of the Corporation on a current basis. Each party will be responsible for an equal share of core costs attributable to the extent that such costs are allocable to joint corporate programs; each party will be responsible for program costs as approved by the respective parties in the Annual Business Plan; and each party will

be responsible for those core and program costs incurred in connection with specific programs identified in the Annual Business Plan and Annual Budget undertaken on behalf of either party individually.

(1) In the event that funds in addition to any approved Annual Budget are required, the parties shall contribute such funds on the same basis in which they are responsible for contributions in the Annual Budget.

(2) In the event that a party does not approve the Annual Business Plan or the Annual Budget, or contribute the required funds in full in a timely fashion, or does not approve any plan or budget for which funds have already been committed or expended, the other party may serve a notice of default upon the non-contributing party. In the event that the default is not cured in full within thirty days of the service of said notice by the non-contributing party, such default, at the option of the non-defaulting party, may be deemed to constitute a notice of dissolution under the terms of paragraph 10. A notice of dissolution based upon such default shall not relieve the non-contributing party from the obligations to contribute its proportionate share for any sums committed or expended, including, without limitation, an equal share of core costs not attributable to specific individually funded programs through the Dissolution Date.

C. *Fiscal Year*. The fiscal year of the Corporation shall be on a calendar year basis unless the Board determines otherwise.

D. *Bank Accounts*. The Board shall designate a bank into which all funds of the Corporation shall be

deposited. The signatures of persons designated by the Board shall be required for all Corporation checks and withdrawals.

E. *Financial Reports.* The Corporation shall prepare an annual financial report to be presented to the parties not later than ninety days following the end of each fiscal year. The Board shall appoint an audit committee comprised of an equal number of representatives of the parties, which shall have regular oversight over the expenditures of the Corporation, and an independent certified public accountant shall annually audit the books of account, records, and financial reports of the Corporation.

9. *Staffing and Employment.*

A. *Executive Vice Presidents.* The initial management of the Corporation shall be directed by two Executive Vice Presidents ("EVP"), one selected by each of the two parties, who shall also provide staff assistance to the Organizing Committee and the Board. The Board shall assume the employment agreements, including benefits, in effect for such individuals; thereafter, the Board shall establish, with the approval of the parties, provisions for the management of the regular operations of the Corporation.

B. *Transfer of Staff.* The Board, prior to the Commencement Date, shall establish policies for the transfer of such staff as it determines will be required for the operations of the Corporation from each of the parties to the Corporation. The Board shall provide for the coordination of compensation, benefits, and other employment policies between the parties in connection with the transfer of staff, and shall develop a uniform salary and benefit

schedule and uniform employment policies. It is recognized that such uniform salaries, benefits and other policies may have to be phased in over time in order to honor existing contracts and other obligations to existing staff. Within the context of existing obligations, the Board shall have the discretion not to transfer all existing staff of the parties to the Corporation, and may approve termination packages to be offered to employees not transferred. It is anticipated that the transfer of staff shall take place on the Commencement Date.

10. *Dissolution of the Corporation.* In addition to provisions for dissolution of the Corporation set forth elsewhere herein, either party may unilaterally cause the dissolution of the Corporation by giving the other party a minimum of one year's advance notice of intended dissolution not later than January 1 of any year, and such notice shall establish a Dissolution Date for January 1 of the following year or such later date as may be agreed. In the event that such notice is given, this Agreement shall continue to operate until the Dissolution Date, during which time the parties shall undertake such actions as are required to separate their respective activities in anticipation of the dissolution of the Corporation. This agreement shall also be dissolved in the event of the dissolution or other termination of existence of either of the parties hereto. A notice of dissolution shall not relieve either party from the obligations to contribute its proportionate share for any sums committed or expended, including, without limitation, an equal share of core costs not attributable to specific programs through the Dissolution Date.

11. *Indemnification of Parties.* Each party shall indemnify and hold harmless the other party for all losses or damages sustained, arising from or caused by any

breach of this Agreement, or any warranty or representation contained herein which is materially incorrect or misleading, or any actions of either party occurring prior to incorporation of the Corporation hereunder.

12. *Subsidiary Organizations.* The Corporation shall be authorized to enter into agreements with the American Dairy Association and the National Dairy Council, subsidiaries of UDIA, for the provision of administrative, financial and program services in connection with this Agreement.

13. *Transfer and Assignment of Existing Contracts and Liabilities.* All contracts of the parties that will be in effect on the Commencement Date will be reviewed by the Board and the respective parties to determine whether they should be assigned to the Corporation or whether they should remain with the original contracting party.

14. *Approvals.* This Agreement is subject to the approval of the Boards of NDB and UDIA, and the Secretary of the United States Department of Agriculture.

15. *Arbitration of Disputes.* In is hereby agreed that any dispute or other controversy between the undersigned in connection with this Agreement shall be submitted to binding arbitration before the American Arbitration Association ("AAA") pursuant to the Commercial Dispute Resolution Rules of the AAA. Arbitration shall be commenced by filing with the AAA by a party, with service on the other party, of a written notice of intent to arbitrate. The arbitration shall then commence pursuant to the rules of the AAA before an arbitration panel of three members selected by the AAA pursuant to its procedures. Any decision of the arbitrator is final, binding, and is not subject to appeal. Such decision may be entered as a

judgment by a court of competent jurisdiction at the request of either party. The parties hereby acknowledge that they are waiving their right to seek remedies in court, including the right to trial by jury, for violations of, or to enforce the terms of, this Agreement.

16. *Notices and Consents.* All notices and consents issued pursuant to this Agreement shall be in writing and shall be served on the other party by hand delivery or certified mail, return receipt requested. If to NDB, said notice or consent shall be delivered or sent to:

Ms. Cynthia Carson
National Dairy Promotion and Research Board
2111 Wilson Boulevard, Suite 600
Arlington, Virginia 22201

If to UDIA, said notice or consent shall be delivered or sent to:

Mr. Thomas Gallagher
United Dairy Industry Association, Inc.
O'Hare International Center
10255 West Higgins Road, Suite 900
Rosemont, Illinois 60018-5616.

The parties may change their addresses for notices and consents by sending such notice of change to the other party pursuant to the requirements of this paragraph.

17. *Modifications and Waivers.* This Agreement constitutes the entire agreement between the parties in relation to the subject matter. No term or provision of this Agreement may be varied, changed, modified, waived or terminated orally, but only by an instrument in writing signed by the party against whom the enforcement of the variation, change, modification, waiver or termination is

sought. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their predecessors, subsidiaries, affiliates, parent companies, successors, successors in interest, assigns, trustees, officers, directors, shareholders, agents, attorneys and employees. Any failure to enforce a term of this Agreement shall not be deemed a waiver thereof.

18. *Further Assurances.* The parties agree to make such further assurances and to execute such additional documents as may be necessary to effectuate this agreement and carry it into effect.

19. *Severability of Provisions.* Any provision of this agreement that is deemed void or unenforceable shall be severed from the balance of the agreement, which remainder shall remain fully binding and enforceable.

20. *Governing Law.* This Agreement shall be governed by and be construed in accordance with the laws of the District of Columbia.

21. *Authority.* All signatory parties hereto represent and warrant that they possess the full and complete authority to covenant and agree as herein provided and further represent and warrant that they have the full and complete authority to execute this Agreement.

22. *Effective Date.* UDIA and NDB agree that this Agreement shall become effective only upon the approval of this Agreement by the United States Department of Agriculture. Such approval shall be evidenced by a separate dated document (which shall become the effective date) stating approval of this Agreement, and such document shall then be attached hereto as Attachment B and incorporated herein.

IN WITNESS WHEREOF, the National Dairy Promotion and Research Board and the United Dairy Industry Association have set their hands and seals on the date first hereinabove mentioned.

ATTEST: NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

/s/ [Illegible] (Seal)

ATTEST: UNITED DAIRY INDUSTRY ASSOCIATION, INC.

/s/ [Illegible] (Seal)

SCHEDULE "A"

1. Approval of Agreement by U.S. Secretary of Agriculture.

2. Qualification of name with state authorities.

3. Preparation and filing of Articles of Incorporation.

4. Tax opinion including tax status of new corporation; statement that new corporation will not impair current tax status of either party; filing of any necessary tax ruling or opinion from Internal Revenue Service.

5. Holding of proper meetings of Corporation Board and adoption of resolutions including:

Election of Officers
Establishment of Bank Accounts
Adoption of Bylaws
Establishment of Committees of the Board
Approval of 1995 Annual Business Plan and Annual Budget
Adoption of Agreements Entered into by Organizing Committee

6. Adoption of required employee benefit plans, employment and employee policies, and preparation for transfer of staff to new corporations.

7. Review of all existing contracts of both parties.

8. Approval of 1995 Annual Business Plan and Annual Budget by both parties and U.S. Department of Agriculture.

9. Satisfactorily address any new legal or procedural issue identified by either party arising subsequent to adoption of this Agreement.

[SEAL] United States
Department of
Agriculture

May 27, 1994

TO: Thomas M. Walsh
Assistant General Counsel
Marketing Division, OGC

THROUGH: Richard M. McKee /s/ Richard McKee
Acting Director
Dairy Division

FROM: Eugene E. Krueger, Head /s/ Eugene E. Krueger
Promotion and Research Staff
Dairy Division

SUBJECT: Contract between the National Dairy Promotion and Research Board (NDB) and the United Dairy Industry Association (UDIA) to Create the Joint Venture Dairy Management, Inc.

ISSUE:

The attached contract between NDB and UDIA is to create a joint venture called Dairy Management, Inc., (DMI). DMI would provide staffing support to both NDB and UDIA.

BACKGROUND:

A lack of generic promotion coordination between the national and State and regional programs has been a regular dairy producer complaint since the beginning of the Dairy Promotion Program. The DMI joint venture (approved by NDB at its March 1994 meeting) is another

in a long series of steps taken by NDB to increase this coordination.

DMI will not be a merger of NDB and UDIA. It will be a merger of their separate staffs into a single staff that serves both organizations. The Dairy Promotion and Research Order (7 CFR 1150) in section 140(c) states that the National Dairy Board has the duty "to appoint or employ such persons as it may deem necessary." It is the duty of NDB and not the Department to establish NDB's staffing needs and organizational structure.

RECOMMENDATION:

That OGC approve the contract to establish DMI

Concurrence: /s/Thomas M. Walsh
Date: 6/7/94

Attachment

The Dairy Producer Checkoff: A $250 Million Business

More than 80,000 dairy producers are the shareholders of the dairy checkoff program, and more than 300 national, state and regional dairy producer board members direct program funds and approve promotion and research programs. The dairy checkoff exists to help increase domestic and international demand for U.S.-produced dairy products.

Checkoff Facts

- Checkoff programs are funded by dairy producers – NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight
- Dairy producers – the shareholders – ultimately determine if the checkoff program is meeting expectations
- More than 300 dairy producer board members represent all dairy producers in directing checkoff funds and approving its programs. They make sure checkoff dollars are strategically invested in the best economic interest of dairy producers
- The dairy checkoff offers producers a positive return on their investment. For every 15 cents per hundredweight dairy producers contribute to the dairy checkoff, they realize a return of 65 cents per hundredweight. *(Source: Cornell University independent economic study published in USDA 2000 Report to Congress)*

- DMI has extensive, board-approved accounting and internal controls to ensure accountability to shareholders
- DMI is accountable to the USDA for all its activities, including program objectives, strategies, services, budgets and accounting procedures
- The dairy checkoff program is independently audited each year to make sure program funds are administered in strict accordance with generally accepted accounting principles. In a 1999 random audit by the General Accounting Office (GAO), the dairy checkoff program received a "clean bill of health" and was among the "cleanest" GAO audits ever
- Dairy producers have the right to ask for a referendum if program effectiveness and efficiency are in question
- The checkoff conducts marketing promotions, product, ingredient and nutrition research, and education programs to help build demand
- The checkoff works with processor organizations to jointly promote fluid milk and conduct projects to improve product, packaging and delivery systems

Dairy Checkoff Works!

- In 2000, total dairy sales increased 2 percent, while total cheese sales increased 3 percent, compared to 1999, according to USDA sales reports

- Per capita dairy consumption also has grown. From 1980 to 2000, per capita total milk consumption grew by nearly 11 percent. Today, the average person consumes more than 584 pounds on a total solid basis, compared to 523 pounds in 1980 *(Source: National Milk Producers Federation)*
- In 1984, there were nearly 20 billion pounds of dairy surplus. Today, even though milk production continues to rise, there is little surplus

Checkoff benefits

Dairy checkoff works . . . for dairy producers

- Increases commodity category sales
- Creates a viable, thriving marketplace for individual businesses
- Provides greater opportunity for brands and businesses to compete for their share of the category
- Protects small producers from being severely disadvantaged against large competitors that could undermine industry growth
- Builds a more favorable economic environment – better prices for producers, more revenue growth for processors

Dairy checkoff works . . . for American consumers

- Reduces dependence on taxpayer dollars for support payments and government administration in times of economic hardship

- Provides an open, free flow of consumer information to help consumers make informed choices about purchasing dairy
- Provides ongoing investments in research to ensure product quality, safety and nutrition expectations